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IN

The Supreme Court

OF THE

United States.

OCTOBER TERM, 1895.

The Insurance Company of North America,
Plaintiff in Error,
vs.
International Trust Company,
Defendant in Error.

No. 906.

PETITION FOR WRIT OF CERTIORARI REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT TO CERTIFY TO THE SUPREME COURT FOR ITS REVIEW AND DETERMINATION THE CASE OF THE INSURANCE COMPANY OF NORTH AMERICA, PLAINTIFF IN ERROR, VS. THE INTERNATIONAL TRUST COMPANY, DEFENDANT IN ERROR.

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Attorneys for The Insurance Company of North America.

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THE INSURANCE COMPANY OF NORTH AMERICA, PETITIONER.

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To the Honorable the Supreme Court of the United States:

The petition of The Insurance Company of North America respectfully shows to this Honorable Court as follows:

I.

Your petitioner is a corporation, organized under the laws of the State of Pennsylvania, and is and was at the times herein mentioned, engaged in the business of fire insurance, in the United States and in the State of Colorado, having its principal place of business in the City of Philadelphia, but with agencies located elsewhere throughout the United States, and among others a general agency at Erie, Pennsylvania, and a local agency at Pueblo, in the State of Colorado.

The International Trust Company is a corporation, organized under the laws of the State of Colorado, with its principal place of business at the City of Denver, in said State.

II.

The International Trust Company filed its complaint against your petitioner at the November term, 1894, of the Circuit Court of the United States for the District of Colorado, seeking to enforce payment of a policy of insurance issued by your petitioner to one John R. Gordon, in the sum of $10,000, upon a hotel building in the City of

Pueblo, which building was destroyed by fire on October 9th, 1893.

The cause was tried before the Hon. John A. Riner, District Judge, without the intervention of a jury, and upon the issues joined and the trial of said cause, a judgment was found for the plaintiff for $10,000, the amount of said policy, with interest and costs. From this judgment The Insurance Company of North America sued out a writ of error from the Circuit Court of Appeals for the Eighth Circuit, and the said Circuit Court of Appeals, at its December term, 1895, affirmed the judgment of the Circuit Court. A petition for a rehearing was duly filed by your petitioner within the time required by law, to-wit: On the 13th day of January, 1896, in the said Circuit Court of Appeals, and the said petition was denied. It is from the judgment of the Circuit Court, affirming the judgment of the Circuit Court, that your petitioner seeks relief and sues for this writ.

III.

A certified copy of the entire record of said cause in the Circuit Court of Appeals is herewith furnished and hereto annexed as part of this application, in conformity with Rule 37 of this Honorable Court, relating to cases from the Circuit Court of Appeals, and is marked Exhibit "A."

IV.

The International Trust Company, plaintiff, in the Circuit Court for its cause of action alleged,

inter alia, that your petitioner issued a policy of insurance, No. 2085, in the amount of $10,000, for six months from the 6th day of July, 1893, upon the property described in the complaint, and that the defendant company did furthermore attach to the policy a mortgage clause or agreement for the benefit and protection of the plaintiff company and its assigns, making the loss, if any, under said policy of insurance, payable to plaintiff company and its assigns, which policy of insurance and mortgage clause attached was delivered to and accepted by the plaintiff company, subject to the terms and conditions thereof, for the protection of itself and its assigns.

That John R. Gordon not having paid the premium upon the policy, the plaintiff company, on the 26th of September, 1893, paid the premium thereon to the defendant company; that on the 9th day of October, 1893, the property was destroyed. That on the date said policy was issued, John R. Gordon was indebted to the plaintiff company in the sum of $50,000, which sum of money he had borrowed on December 12th, 1892, and in evidence thereof had executed his promissory note, dated December 12th, 1892, for the sum of $50,000, payable June 12th, 1893, to the plaintiff company or its order; that to secure said note, Gordon did, on December 12th, 1892, execute and deliver a deed of trust to Mahlon D. Thatcher, upon all of the certain lots described, together with all buildings and improvements thereon; that neither the note nor any portion thereof was paid at the time the buildings were destroyed; that on the date said policy was issued, and at all times between said date and the 9th

day of October, 1893, the plaintiff had possessed a good and insurable interest in the property aforesaid, under and by virtue of the indebtedness of the said John R. Gordon, and aforesaid deed of trust securing the same, to the amount of $50,000 with interest thereon; that both before and since the fire, the plaintiff company had done all things and performed all acts required of it by defendant company under its agreement of insurance, or by the mortgage clause or agreement thereto attached; that John R. Gordon also furnished notice and proofs of loss as required by the policy of insurance.

V.

Your petitioner, defendant, for one affirmative defense, set out the following conditions of the policy, viz.:

"This entire policy shall be void if the insured has concealed or misrepresented in writing or otherwise any material fact or circumstance concerning this insurance or the subject thereof, or if the interest of the insured in the property be not truly stated herein."

And the further condition of the policy, to-wit:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto shall be void, if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple."

And alleged that at the time said policy was made, issued and delivered, to-wit: On the 6th day of July, 1893, the said Gordon was not the uncon-

ditional and sole owner of the said property, and the ground on which said building stood was not owned by said Gordon in fee simple, but that Gordon had long prior thereto sold, transferred and conveyed all of his right, title and interest therein to The Mesa Hotel and Improvement Company.

That when the defendant was informed of the facts aforesaid, and long prior to the bringing of dered to the plaintiff corporation the full amount of all premiums and considerations advanced by the plaintiff corporation; but the plaintiff refused to accept said sum, or any sum, other than the full amount of the policy.

VI.

For a second affirmative defense, the defendant says that long prior to the 6th day of July, 1893, the plaintiff corporation sold, transferred and assigned to The Investors' Mortgage Security Company, Limited, of Scotland, all of its right, title and interest in and to the note and securities and indebtedness of and from the said John R. Gordon to the said plaintiff corporation. And that on the 6th day of July, 1893, the plaintiff corporation was not the owner or holder of such indebtedness or securities, but said note, securities and indebtedness were held and owned by the said Investors' Mortgage Security Company. And at the dates aforesaid the plaintiff corporation had no title or interest therein, and had ceased wholly to be the owner or holder thereof.

VII.

For a reply to these defenses, plaintiff says that if a transfer was made by Gordon of the property to

The Mesa Hotel and Improvement Company, it was totally without the consent or knowledge of the plaintiff, and neither the plaintiff nor Mahlon D. Thatcher, Trustee, had any notice or knowledge of such transfer until after the property insured had been destroyed by fire. Denies that the plaintiff was not the owner of the Gordon note at the date of the policy, and at all other times between that date and the destruction of said property, but that plaintiff had, prior to the 26th day of June, 1893, purchased said note and continued the sole owner thereof ever since said time.

VIII.

The trial Court made certain special findings of fact, and among others the following, being Nos. 15 and 16 of the special findings of said Court:

"That prior to the 6th day of July, 1893, and on or about the 3d day of July, 1893, the said John R. Gordon transferred and conveyed the title of the real estate and Mesa Hotel property aforesaid, to a corporation known as The Mesa Hotel and Improvement Company, the deed of conveyance being recorded on the 3d day of July, 1893.

"That neither The International Trust Company nor any officer thereof, nor the said Mahlon D. Thatcher, Trustee, had any notice or knowledge of such conveyance whatsoever until subsequent to the destruction of the said hotel building by fire on the 9th day of October, 1893, as hereinafter set out; nor did the defendant company or its agent have any such notice or knowledge of the conveyance aforesaid."

IX.

The Court also made, among other findings, the following, which is the 9th special finding of the trial Court: "The International Trust Company did, on the 12th day of June, 1893, reacquire title to the note of said John R. Gordon, by repurchase, and did reacquire an insurable interest in and to the property covered by the policy of insurance issued by defendant company; and the Trust Company did, on the 12th day of June, 1893, actually pay to the said Investors' Mortgage Security Company, the sum of $1,750, being part of the amount due upon repurchase, and did assume the payment of the balance of the purchase price, viz.: $50,000, and did from that time on treat and dispose of said note as its own property; that although said note has never been foreclosed, no definite extension of the same has been given, and the same has remained in default ever since the 12th day of June, 1893."

Also, the following special finding, being No. 10 of the special findings of the trial Court, viz.: "That by agreement between The International Trust Company and the said Investors' Mortgage Security Company, The International Trust Company was given time wherein to make the payment of the balance of $50,000 upon the repurchase as aforesaid, and it did thereafter pay said amount in full to The Investors' Mortgage Security Company, with interest thereon at 7 per cent. from the 12th day of June, 1893, to September 12th, 1893, and at the rate of 9 per cent. from September 12th to date of payment."

X.

With regard to the matter of repurchase of the Gordon note by The International Trust Company, the record and findings of fact show that on or about the 29th day of December, 1892, The International Trust Company sold and transferred, *without recourse*, to The Investors' Mortgage Security Company, Limited, of Scotland, the said note of John R. Gordon; and of the sale and transfer of said note no notice was ever given to defendant company.

On the maturity of the note, June 12th, 1893, Gordon was in default thereon for both principal and interest. The note was sent to The International Trust Company for collection. On June 12th, The International Trust Company remitted the accrued interest of $1,750 to the Investors' Company, which interest was paid by Gordon to the Trust Company a few days thereafter, viz.: On June 19th, 1893.

In support of its claims to the ownership of the Gordon note the Trust Company introduced certain letters and telegrams which passed between the Trust Company and The Investors' Mortgage Security Company, beginning on May 26th, 1893, and continuing until September 27th, 1893.

The entire negotiations with the Investors' Company upon which the Trust Company bases its claims to the insurable interest required by the policy is evidenced by this correspondence.

XI.

At the trial of the case in the Circuit Court, and at the close of the testimony, prior to any findings of fact, the defendant made a request that the Court rule as a matter of law, that from the correspondence between The International Trust Company and The Investors' Mortgage Security Company, the ownership and title to the Gordon note did not vest in the Trust Company until after the issuing of defendant's policy, which request the Court refused, and to the refusal of the Court the defendant then and there excepted. The defendant also thereupon asked a ruling that as a matter of law the Trust Company did not have an insurable interest in the property at the time of the issuing of defendant's policy, which request the Court refused, and to the refusal of the Court so to rule, the defendant then and there excepted. Defendant also asked for a ruling upon the evidence that the Trust Company did not have such an insurable interest either in the property or in the indebtedness as was sufficient in law to sustain the policy, and did not have the insurable interest required by the terms of the policy and the mortgage clause. The Court refused to make this ruling, and to the refusal of the Court in this behalf the defendant excepted at the time.

The defendant further, at the conclusion of the testimony, moved for a judgment for the defendant, upon the ground that the evidence does not show facts sufficient to constitute a cause of action, which motion the Court overruled, and to the overruling of said motion the defendant then and there duly excepted. The defendant also excepted specifically to

the 9th special finding of fact made by the Court: "On the ground that said special finding as to the ownership of the Gordon note is a conclusion of law from the evidence, and not a finding of fact, and because the finding that The International Trust Company had an insurable interest at the time of the issuing of the policy is a conclusion of law and not a finding of fact; and because it is shown by the evidence that the entire negotiations relative to the repurchase of the Gordon note by The International Trust Company was conducted by correspondence, which is in evidence, and fully set forth in the record, and that said correspondence, and all of the evidence relating thereto, show as a matter of law, that the ownership and title to said note was not acquired by nor vested in The International Trust Company at the time the policy of defendant was issued. And because said correspondence, and all the evidence relating thereto, show as a matter of law that The International Trust Company did not have at the time said policy was issued, a valid, legal or sufficient interest in the property, or in the indebtedness to support the policy and mortgage clause, and did not have the insurable interest required and called for by the policy and mortgage clause."

And to the making of said special finding over the objection of the defendant, the defendant then and there duly excepted.

XII.

In the Circuit Court of Appeals, with respect to the said 9th special finding of fact, the Court said:

"This finding of the trial Court is conclusive in this Court, and cannot be reviewed. It matters not, we think, that the finding in question is based largely upon letters and telegrams which passed between the Trust Company and The Investors' Mortgage Security Company, and upon deductions drawn from such correspondence. A special finding of fact, as was said by Mr. Justice Miller, in Burr vs. Des Moines Nav. and R. R. Co., 1 Wallace, 99, 102, 'is a statement of the ultimate facts or propositions which the evidence is intended to establish, and not the evidence on which those ultimate facts are supposed to rest. The statement must be sufficient in itself, without inferences or comparisons, or balancing of testimony, or weighing evidence, to justify the application of the legal principles which must determine the case. It must leave none of the functions of a jury to be discharged by this Court, but must have all the sufficiency, fullness, and perspicuity of a special verdict. If it requires of the Court to weigh conflicting testimony, or to balance admitted facts, and deduce from these the propositions of fact on which alone a legal conclusion can rest, then it is not such a statement as this Court can act upon.' See, also, Hinkley vs. City of Arkansas City, 69 Fed. Rep., 768, 771; Id., — U. S. App., —. It results from this view that when a trial Court is called upon to state the ultimate proposition of facts established by the evidence, in the form of a special finding, it will often be compelled to embody in the finding some legal inference as well as inferences of fact. Such will generally be the case when, as in the present instance, the ultimate fact to be found relates to the acquisition or ownership of property. We think,

therefore, that the conclusive effect of a special finding of fact cannot be made to depend upon the character of the proof upon which it rests. If such a finding is regarded as conclusive and not subject to review when it rests on oral testimony, it must be regarded as equally conclusive when it rests on written evidence, or on evidence that is in part written and in part oral. The rule is inflexible in the Federal Courts, that when a jury is waived, and the Court makes a special finding, an Appellate Court cannot look into the evidence on which the finding is based, except for the purpose of ascertaining whether an error was committed in admitting or excluding testimony. Stanley vs. Supervisors of Albany, 121 U. S., 535, 547; Walker vs. Miller, 19 U. S. App., 403; Id., 8 C. C. A., 331; Searcy County vs. Thompson, 13 C. C. A., 349. In the present cases no objection was made to the evidence on which the finding in question was based, nor was the Court asked to reject or to exclude the evidence after it had been introduced on the ground that it had no tendency to show that the Trust Company had an insurable interest in the insured property when the policies in controversy were issued. On the contrary, the case was tried on the evident assumption that the evidence in question had some tendency to establish the existence of an insurable interest, and the objection now urged is in substance that the finding made by the trial Court was against the weight of evidence. It goes without saying that we cannot notice an objection of that character. Hartford Life Annuity Insurance Co. vs. Unsell, 144 U. S., 439, 451."

To this view of the majority of the Court, Sanborn, J., dissented and said:

"I am unable to concur in the view taken by the majority of the Court, that the question whether or not there was any evidence sufficient to support a finding that The International Trust Company of Denver, the defendant in error, had an insurable interest in the property destroyed, was not presented for our consideration by the record in these cases. At the close of the evidence, counsel for plaintiff in error moved the Court for a finding and judgment in its favor, 'upon the ground that the evidence is insufficient to show a cause of action in favor of the plaintiff company, or to support a judgment entered upon such finding for the plaintiff company,' and this motion was denied and an exception to this ruling of the Court was taken. In my view, this motion had the same effect that a request to the Court to instruct the jury peremptorily to find for the defendant would have had if the trial had been before a jury. It is not necessary to pass upon the weight or the sufficiency of the evidence to determine this question of law. It is to be decided like a question which arises upon such a request to the jury—upon the concession that the motion must be denied if there is evidence in the record sufficient to sustain a finding for the plaintiff. Revised Statutes, section 700; Clement vs. Insurance Company, 7 Blatch., 51, 53, 54, 58; Lehnen vs. Dickson, 148 U. S., 71, 72, 78; Martinton vs. Fairbanks, 112 U. S., 670, 672, 674; St. Louis vs. Western Union Telegraph Company, 148 U. S., 92, 96; Mercantile Trust Company vs. Wood, 5 C. C. A., 658; 60 Fed. Rep., 346, 348; Searcy County

vs. Thompson, 13 C. C. A., 349, 354 to 358; 66 Fed. Rep., 92.

"As all the evidence relating to the insurable interest of the defendant in error consisted of letters contained in the record, this motion, in my view, raised the question whether or not all reasonable men, upon the perusal of those letters, would, in the exercise of a sound and unprejudiced judgment, come to the conclusion that these letters did not show that the defendant in error had an insurable interest in the property destroyed."

XIII.

The Court of Apeals further said upon this branch of the case:

"But even if the special finding now under consideration was open to review by this Court, we should not be able to say that the Circuit Court erred in finding that the Trust Company had such an insurable interest as was sufficient to support the policies. In the case of The International Trust Company vs. The Norwich Union Fire Insurance Society, we have held that the Trust Company had an insurable interest on June 26th, 1893, by virtue of the consummated agreement with The Investors' Mortgage Security Company to take up the Gordon note which was secured by a deed of trust on the insured property. It was further shown in these cases that on June 12th, 1893, the Trust Company had advanced and paid the interest on said note, amounting to $1,750, and we think it most probable, in view of the relations then existing between the Trust Company and the Mortgage Company, that the

payment so made gave the former company such an interest in the note and deed of trust as would serve to support a policy covering the mortgaged property which was taken out after that date."

XIV.

The correspondence between The International Trust Company and The Investors' Mortgage Security Company, relative to the collection and repurchase of the Gordon note, is as follows:

On May 26th, 1893, Cuyler, Morgan & Company wrote, New York representatives of the Investors' Company, The International Trust Company, saying:

"We hold note No. 1026, signed 'John R. Gordon,' due June 12th, for $50,000, with coupon attached for $1,750. Please inform us if you will send cheque to us to take up this note, or if we shall forward the same to you for collection. Your prompt reply will oblige."

On May 29th, International Trust Company wrote Cuyler, Morgan & Company as follows:

"Your two letters of the 26th inst. received. The Gordon note for $50,000, with coupon attached for $1,750, due 12th of June, you will kindly forward to this office for collection. Do not endorse the bill and coupon to our order, but simply forward them as they are, and oblige."

On June 2d, 1893, Cuyler, Morgan & Company wrote International Trust Company, saying:

"We are in receipt of your favor of the 29th ultimo, contents of which we have noted, and we beg to advise you that we are to-day forwarding to

your good selves for collection, under registered cover and seal of our notary, the Gordon note for $50,000, with coupon for $1,750, due June 12th, attached."

On the same date, Cuyler, Morgan & Company transmitted the note, with letter of enclosure as follows:

"We enclose herein, under registered cover and seal of our notary, Mr. J. M. French, the undermentioned securities:

"Note John R. Gordon, dated December 12th, 1892, due June 12th, 1893, in favor of yourselves, for $50,000, with coupon attached, due same date, for $1,750, together amounting to $51,750, for collection and remittance.

On June 7th, 1893, International Trust Company wrote Cuyler, Morgan & Company as follows:

"This is to acknowledge receipt of your valued favor of the 2d inst., enclosing the note of John R. Gordon for $50,000, and attached coupon for $1,750, for collection as stated."

On June 12th, 1893, International Trust Company wrote Cuyler, Morgan & Company as follows:

"In regard to the loan of John R. Gordon, held by The Investors' Mortgage Security Company, Limited, for $50,000, we beg leave to advise you that, as we were authorized to reinvest the money, we have arranged to extend the loan six months, and herewith enclose you New York draft, No. 258, on The State Trust Company, for $1,750, interest to date. Be kind enough to acknowledge receipt."

On June 12th, 1893, Cuyler, Morgan & Company telegraphed International Trust Company as follows:

"Is Gordon note paid? Wire."

On June 12th, 1893, International Trust Company answered above telegram as follows:

"It is understood we were to reinvest money. Not instructed to contrary, consequently arranged six months' extension loan. Interest remitted today. Wired Investors' Company if they desired, we will take loan ourselves within short while."

And on same date wrote as follows:

"We have just sent you draft for interest on the loan of Gordon on account of The Investors' Mortgage and Security Company, and received your telegram asking if Gordon note was paid, to wire. We judge from that, that there was some expectation of the note being paid and remittance made for other purposes, and we, consequently, wired you to the effect that we understood that we were to reinvest the money, and, as no instructions to the contrary had been received, we had arranged six months' extension of the loan, and we have wired the Investors' Company that, if they desired it, we will take up the loan ourselves as soon as possible—probably in a few weeks. At the time the money was placed in our hands, it was distinctly understood that we should reinvest it at the expiration of the Gordon loan, and, as Mr. Gordon desired an extension, and we had no contrary instructions, we felt authorized to agree to the same. We, however, never wish our correspondents to be dissatisfied, and, if the Investors' Company wishes the money, we will take the loan off their hands. We would do so immediately, but for the fact that money is very tight out here, and we have arranged to use all the money we can spare for the next few weeks. It may be

that within the next ten days we will take up the loan and remit to you."

On June 15th, 1893, Cuyler, Morgan & Company wrote International Trust Company as follows:

"We beg to acknowledge receipt of your two favors of 12th inst., with remittance of $1,750, being interest due on Gordon $50,000 account of Investors' Mortgage Security Company, for which we thank you. We note the contents of your letters, and are writing the Investors' Company in this connection."

On May 31st, 1893, Guild & Shepherd, the Home Secretaries of the Investors' Company, wrote from Edinburgh to The International Trust Company regarding some other loans, and, in regard to the Gordon loan, said:

"We are so short of funds at present that, on the repayment of the Pueblo loan on the 12th prox., we shall require the money at our bankers', in New York. Yours truly,

"GUILD & SHEPHERD.

"P. S.—When the Pueblo loan has been repaid and remitted to New York, you might kindly cable the word 'Pueblo.'"

This letter was received by The International Trust Company on June 12th, 1893.

On June 12th, 1893, The International Trust Company telegraphed Guild & Shepherd as follows:

"Cuyler wires about payment Gordon note. Presuming we to reinvest, arranged six months' extension. Can take loan ourselves soon, if desired. Wait my letter of this date."

On same date, June 12th, International Trust Company wrote Guild & Shepherd as follows:

"This morning we received a message from

Messrs. Cuyler, Morgan & Company, asking if the Gordon note had been paid, and to wire answer. In reply, we sent telegram, copy of which we herewith enclose you. At the same time, we wired you, copy of telegram herewith enclosed. You will remember that at the time this loan was made we agreed to reinvest the money for you, and it was our distinct understanding that you desired us so to do. We have heretofore received no instructions to the contrary, and we naturally presumed that you wish your money to remain reinvested; and, as Mr. Gordon has been unable, on account of the extreme tightness of the money market and the difficulty in getting money, to arrange a large loan which he had been negotiating, he applied for an extension, and we had arranged to extend his loan six months. Although, as stated herewith, we understood that we were authorized to reinvest this money, which, in my opinion, would cover an extension of this loan, but we wish you to be entirely satisfied in regard to it, and I am, therefore, authorized by our Executive Committee to say that we will, just as soon as possible, take up the Gordon loan ourselves, if you desire it, and remit the money to Cuyler, Morgan & Company, to your credit.

"Please wire us, upon receipt of this letter, what your wishes are in the premises, and we will arrange to conform to them.

"P. S.—We remit to Cuyler, Morgan & Company, $1,750, interest on above loan."

On June 13th, 1893, International Trust Company wrote Guild & Shepherd as follows:

"Referring to our letter and telegram of yester-

day, we beg leave to say that we are just in receipt of your favor of May 31st, in which you say as follows, to-wit:

"'We are so short of funds at present that, on the repayment of the Pueblo loan, on the 12th prox., we shall require the money at our bankers, in New York.'

"I greatly regret that we did not receive such instructions a little earlier, as we could have arranged to let you have the money promptly on the 12th; but, as you will remember, when we made the Gordon loan, it was understood that we were to reinvest this money, and, if we had not arranged to extend the loan to Mr. Gordon, we should, in the absence of instructions to the contrary, have arranged for reinvestment, so that you would not lose any interest. Confirming my letter of yesterday, the best that I can do under the circumstances is to say that we will, ourselves, just as soon as possible, if you desire it, take up the loan and carry it ourselves. We would do so immediately but for the fact that times have been very hard here, and we have been compelled to renew loans, and to carry our customers for considerable amounts, which makes us pretty short in funds at present; but we are expecting some large loans to be paid between now and the 1st of July. You need not have the least anxiety about this loan or security, for, whilst we do not legally guarantee any loans, we always stand back of our correspondents, and protect them, and, at any time, we would rather take up a loan than to have them dissatisfied. To be perfectly frank, it would be quite inconvenient for us to take up this loan at present, as we need all of our money, and, if entirely agreeable to you,

we would like to have the privilege of taking it up at any time within sixty days from its maturity—viz.: at any time before August 12th."

"We remitted yesterday to Messrs. Cuyler, Morgan & Company $1,750, the interest upon this loan, for the past six months. Notwithstanding the hard times, the general condition in this State is good, and, I think, Denver may boast of the best condition of any city of its size in the United States. The fall in our silver was largely discounted, and we have no fear here of anything more than a dullness and a depression for a time.

"Awaiting your further advices and wishes."

On June 14th, 1893, Guild & Shepherd wrote International Trust Company as follows:

"We beg to confirm the following cable message, which we received from you on the 13th inst.:

"'Cuyler wires about payment Gordon note. Presuming we to reinvest, arranged six months' extension. Can take loan ourselves, soon, if desired. Wait my letter of this date.'

"We, accordingly, await your letter."

On June 26th, 1893, Guild & Shepherd cabled International Trust Company as follows:

"Have received your letter 13th of June. We will delay until 15th of September."

This cable received June 26th.

On same date, June 26th, 1893, The International Trust Company wrote Guild & Shepherd as follows:

"We are in receipt this morning of cablegram from you, as follows:

"'Candidness bedroom gayness benefit,' which, translated, means, as we make it, 'Have received your letter of the 13th of June. We will delay until the 15th of September.'

"This is satisfactory to us, and we will arran[illegible] to take up the loan at that time. We would do so now, but, as we wrote you, it would be quite an inconvenience for us, in view of the hard times.

"We have the note here, and would suggest that, as we are to take it up, that we hold it for the present, and send to you to be endorsed over to us. The note now stands in your name, consequently we will wish it endorsed to us when we take it up.

"Thanking you for your courtesy, and regretting that we should have misunderstood your wishes in this mater, I am, Yours truly."

Under date of June 28th, 1893, Guild & Shepherd, Secretaries, wrote International Trust Company as follows:

"Edinburgh, 28th June, 1893.

"Loan p. $50,000. John Gordon.

"Dear Sir: We were duly favored with your letters of 12th and 13th inst., and had, also, your cable of the former date. Your letters were submitted to the Directors at their board meeting on the 26th inst., and they ask us to say that they regret exceedingly that their commitments will necessitate their asking repayment of this loan. We regret that we did not give you earlier intimation, but when you mentioned at the time you made the loan that you

would be able to reinvest, we did not consider that it was actually agreed between us that you were to reinvest without further communication. On this point we should, perhaps, have made matters more clear, and we regret that we did not do so. Our Directors ask us to thank you for your kind offer to relieve them of this loan. They do not desire to inconvenience you by asking you to relieve them of it at the present time, but they would like that you should make such arrangements as would enable you to take it over from us at a date not later than 15th September next. When you do so take it over, we shall be obliged if you will kindly place the amount, with interest to that date, to the credit of our account with Cuyler, Morgan & Company. We think we already explained to you that we hope to be able to lend further in the spring of next year, and we shall keep your claims to a portion of the amount which we then hope to be able to place before our board.

"Thanking you for your assistance in this matter, we are,"

The letter of June 28th was received by The International Trust Company, July 15th, 1893.

On July 21st, 1893, International Trust Company wrote Investors' Company, saying:

"In anticipation of the fact that we expect to take up the loan to John R. Gordon of $50,000, I send you herewith note to be endorsed by you to us. In endorsing the same, please endorse it to John F. Bell, Trustee, instead of directly to the company. You might send it back to us direct, unless there is some objection, and we will hold the same and be

responsible for it. We hope to be able to take up this loan as we proposed, promptly on the 15th of September; but if times continue as they are now, we may be compelled to ask some further indulgence from your company, but will be prepared to give you ample security if you desire it. I do not say this in anticipation of the fact that we shall do so, but simply because in the present condition of affairs here, it is absolutely impossible to collect money. We are carrying our people, and pushing them would simply mean ruin to them and a greater delay in getting our money."

On August 5, Guild & Shepherd, Secretaries, wrote International Trust Company, saying:

"We are in receipt of your letter of the 21st ulto., enclosing note for $50,000, by John R. Gordon, to be endorsed by this company to you. The note will be endorsed at the next meeting of the Directors to be held on Wednesday, the 9th inst., and thereafter returned to you."

And on August 9th, 1893, Guild & Shepherd wrote International Trust Company, saying:

"John F. Bell, Secretary The International Trust Company, Denver, Colorado, U. S. A.:

"Dear Sir: The Directors at their meeting today authorized the indorsation of this note to you as Trustee, and we now send same herewith so endorsed. Kindly acknowledge receipt of same and hold it for collection. We trust that it will not put your company to any great inconvenience to make payment of the same on the 15th of next month.

We think that we already explained to you that our reason for asking you to relieve us of this loan was that we close our books for the year about then, and wish the payment for other engagements which we have to meet before the balance.

"We have to acknowledge receipt of your letter of the 15th ult., enclosing statement of remittances to Messrs. Cuyler, Morgan & Company, which we have examined and found correct. We have also your letter of the 24th ulto., and are glad to know that you can give such a good account of your position. So far as we know, nothing of the report you refer to got into the papers on this side."

The endorsement upon the note made by the Investors' Company was as follows:

"Pay John F. Bell, Trustee, for Investors' Mortgage Security Company, L't'd.

"GUILD & SHEPHERD,

"Secretaries."

On August 22d, International Trust Company wrote Guild & Shepherd as follows.

"Your favor of the 9th inst. received along with Gordon note for $50,000. I have also a letter from Mr. R. H. Guild, and we will be very much pleased to have him spend a few days with us next month."

On September 5th, 1893, International Trust Company wrote Guild & Shepherd as follows:

"I am in receipt of your letter of August 21st, in which you state that your Directors have consented to extend the Gordon loan for one year from Sep-

tember 15th, at nine per cent. interest, we giving our obligation for the same, and placing in the hands of your bankers in New York as security, the Gordon note for $50,000, and such additional collateral as will be satisfactory to you. I must frankly admit that we are extremely adverse to paying as high a rate of interest as nine per cent. a year, and I had hoped that in view of our prompt action in assuming personally this loan (although we were not legally liable for the same), that your Directors would deal somewhat more liberally with us; still, we would prefer to pay nine per cent. for a short time rather than to be forced to distress our customers in the present financial condition of the country. In view of the high rate of interest, however, we wish to have the privilege of paying at the end of any three months, whatever amount we may find convenient, with interest to date, which will then be credited upon the notes. We think we are fairly entitled to this under all the circumstances. Upon September 15th we will, if possible, make a remittance on account, and fix up the balance in the manner agreed upon."

(The letter of August 21st is not in evidence.)

On September 22d, 1893, Guild & Shepherd wrote International Trust Company as follows:

"We have your letter of the 5th inst., which was submitted to our Directors at their meeting on Wednesday. They feel highly gratified at the way in which you have treated us in this loan, and would have been glad had it been possible to accept 7 per cent. interest. Unfortunately, the crisis which has been felt so keenly by you has not been without its

effects here, and the fact of our not getting payment of this loan and some other loans which we were depending upon has forced us to sacrifice securities in our hands by realizing in the present depressed state of the market, so that, in the circumstances, they feel it necessary to ask a higher rate of interest. They, however, fall in willingly with your request to have the privilege of paying at the end of any three months whatever amount you may find convenient, with the interest to date, which will then be credited upon the note. We note that upon the 15th of this month you hope to make such a remittance to account which will meet with our views. Regretting that we are unable to accept of terms which would be more favorable, we remain."

September 23d, 1893, International Trust Company wrote Guild & Shepherd as follows:

"Referring to your letter of the 21st of August in reference to the Gordon loan and to our letter of September 5th in reference to the matter, I beg leave to say that we to-day send to Cuyler, Morgan & Company a remittance of $10,000 on account, with interest on the Gordon loan from June 12th to September 12th, and our note for $40,000, payable on or before one year. As collateral for said loan, we send the Gordon note, and two other notes amounting to $11,000, making the collateral held for our loan $61,000. Instead of dating our loan September 15th, we dated it September 12th, on acount of that being the time when the quarterly interest is due, and I herewith send you a copy of the note as sent to Cuyler, Morgan & Company. We arranged this matter with Mr. R. H. Guild, who was recently in this city, and

he was satisfied with the additional collateral which we have sent on. You will note further, by the copy of note sent you, that according to our letter, we reserve the right to pay at the end of any three months any portion of this loan. On account of pressure of business we are not able to send you to-day as complete statement of this matter and of other matters as you desire by your letter of September 13th, which I received this morning, but will do so by the next mail.

"Trusting that this matter is arranged satisfactorily to you."

On September 27th, 1893, Guild & Shepherd wrote as follows:

"We beg to confirm the following cable, which we received from you on the 24th inst., viz.: 'Decussate Cuyler adverb dollars account Gordon,' the interpretation of which is: 'Have remitted to-day to Cuyler, Morgan & Company, $10,000 on account of the Gordon loan.'

"On 9th August we sent you out the Gordon note endorsed to you as Trustee. We presume you have endorsed on the note the $10,000 paid to account. The interest on this sum and the balance to be paid will be calculated afterwards, and we presume you do not wish us to take off this sum the interest to date, but as to this, perhaps you might write us. We shall be glad to hear from you.

"P. S.—We shall also be glad to hear from you as to the lodging of the proposed securities with Messrs. Cuyler, Morgan & Company, of New York."

XV.

The following is a copy of said note, with all endorsements thereon:

"Due 12th June, 1893.

"The International Trust Company.

"$50,000. Denver Colorado, December 12th, 1892.

"On the 12th day of June, A. D. 1893, for value received, I promise to pay to the order of The International Trust Company the principal sum of $50,000 in gold coin, with interest thereon at the rate of seven (7) per cent. per annum from date until maturity, payable semi-annually, according to the tenor of one (1) interest notes hereto attached bearing even date herewith, both principal and interest payable at the office of The International Trust Company, Denver, Colorado.

"This note bears interest from maturity until paid, at the rate of ten (10) per cent. per annum. On failure to pay any installment of interest when due, the holder may collect the principal and interest at once.

"No. 1026. JOHN R. GORDON.

"Note—This note is secured by trust deed on lots Nos. 11 to 16, inclusive, block 126, in South Pueblo."

"Endorsed: Gordon. No. 541. $50,000. Coupon Trust Deed Note. Interest and principal payable at the office of The International Trust Company, Denver, Colo."

"For value received, we hereby transfer and assign the within note, together with all interest

in and all rights under the trust deed securing the same, to The Investors' Mortgage Security Company, Ld., without recourse.

"THE INTERNATIONAL TRUST COMPANY,
"By John F. Bell, Secretary."

"Pay John F. Bell, Trustee, for Investors' Mortgage Security Company, Limited.
"GUILD & SHEPHERD, Secretaries."

"Pay The International Trust Company, or order, without recourse.
"JOHN F. BELL, Trustee."

"By Colorado laws the property securing the note is conveyed to a Trustee, who holds it in trust for the note holder until the note is paid. If the interest or the principal is not paid, the property may be sold, four weeks' newspaper notice being required. The transfer of the note carries the trust deed with it, no other transfer being necessary."

Coupon:

"The International Trust Company, Denver, Colo.

"$1,750. Denver, Colo., Dec. 12th, 1892.

"On the 12th day of June, 1893, for value received, I promise to pay to the order of The International Trust Company, seventeen hundred fifty dollars, at the office of The International Trust Company, Denver, Colo., being the interest due on a principal note, No. 1026, for $50,000, of even date herewith. This note bears interest from maturity until paid at the rate of ten per cent. per annum.

"No. I. JOHN R. GORDON."

Endorsed:

"Loan No.... Secured by trust deed on..... Pay to the order of ....., without recourse."

XVI.

With respect to the defense, that prior to the issuing of the defendant's policy, John R. Gordon had sold and conveyed the property and had no interest therein at the date of the issuing of the policy, the Court of Appeals, in its opinion, said: "There are no other questions arising upon the record in these cases which can be considered in view of the special finding of facts, and in view of the recent decision of this Court in the case of Syndicate Insurance Company vs. Bohn, 12th C. C. A., 531. In that case this Court held that a mortgage clause, such as was attached to each of the policies in suit, had the effect of making a new contract between the mortgagee and the Insurance Company, which was dependent for its validity solely upon the conduct of the company and the mortgagee, and was unaffected by any act or neglect of the mortgagor of which the mortgagee was ignorant, whether such act was done or omitted prior or subsequent to the execution of the mortgage clause. To that ruling we still adhere, and it results from that view of the effect of the mortgage clause that the policies in suit were not rendered invalid by the sale and conveyance of the mortgaged property by Gordon, the mortgagor, on or about July 3d, 1893."

XVII.

The policy in suit is what is known in current underwriting as the New York Standard form of

policy, and is the form of policy adopted by statute in the State of New York, and is the same form as is adopted by statute in the States of Pennsylvania, New Jersey, Michigan, Wisconsin, North Dakota, and South Dakota. And it is also the form of policy now adopted and in general use by fire insurance companies throughout the other States of the Union.

The mortgage clause attached to the policy is a modification of what is known in current underwriting as the Union or Standard mortgage clause, which is a form of mortgage clause adopted by statute in the State of New York and elsewhere, and is the form in use by fire underwriters generally throughout the United States and Canada.

The two papers combined constitute what is now termed in underwriting generally as a "Standard Policy with Mortgage Clause Attached."

Among the provisions of the policy are the following:

"This entire policy shall be void . . . if the assured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance, or the subject thereof, or if the interest of the insured in the property be not truly stated herein." Also: "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple, or if any change other than by the death of the insured takes place in the interest, title or

possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by voluntary act of the insured or otherwise."

The mortgage clause is as follows:

"Whereas, The property described in this policy has been conveyed to Mahlon D. Thatcher, in trust, to secure the payment of a certain indebtedness to The International Trust Company, Denver, Colorado; and

"Whereas, The owner of the policy has requested that the loss, if any, be made payable to the said company; therefore, the loss, if any, is made payable to The International Trust Company, Denver, Colorado, and its assigns.

"It being hereby understood and agreed that this insurance, as to the interest of the Mortgagee or Trustee only therein, shall not be invalidated by any act or neglect of the Mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy; Provided, That in case the Mortgagor or owner neglects or refuses to pay any premium due under this policy, then, on demand, the Mortgagee or Trustee shall pay the same; Provided, also, That the Mortgagee or Trustee shall notify this company of any change of ownership or increase of hazard which shall come to his or their knowledge, and shall have permission for such change of ownership or increase of hazard duly endorsed on this policy; and, Provided, further, That every increase of hazard not permitted by the policy to the Mortgagor or owner, shall be paid for by the Mortgagee

or Trustee on reasonable demand, and after demand made by this company upon and refusal by the Mortgagor or owner to pay, according to the established schedule of rates. It is, however, understood that this company reserves the right to cancel this policy as stipulated in the printed conditions of said policy; and, also, to cancel this agreement on giving ten days' notice of its intention to the Trustee or Mortgagee named therein, and from and after the expiration of the said ten days this agreement shall be null and void. It is further agreed, that in case of any other insurance upon the property hereby insured, then this company shall not be liable, under this policy, for a greater portion of any loss sustained, than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein. It is also agreed, that whenever this company shall pay the Mortgagee or Trustee any sum for loss under this policy, and shall claim that as to the Mortgagor or owner no liability therefore exists, it shall at once and to the extent of such payment be legally subrogated to all the rights of the party to whom such payment shall be made, under any and all securities held by such party for the payment of said debt. But such subrogation shall be in subordination to the claim of said party for the balance of the debt so secured. Or said company may, at its option, pay the said Mortgagee or Trustee the whole debt so secured, with all the interest which may have accrued thereon to the date of such payment, and shall thereupon receive from the party to whom such payment shall be made an assignment and transfer of said debt, with all se-

curities held by said parties for the payment thereof.

"In testimony that the foregoing provisions are made a part of Policy No. 2085, of Insurance Company of North America, to which they are attached, witness my hand, at Pueblo, Colorado, this sixth day of July, A. D. 1893.

"(Signed.) BENSON & KIRTLAND, Agents."

"Accepted and agreed to by The International Trust Company.

"(Signed by)

"HENRY W. HOBSON, Vice President."

The policy also provided as follows:

"If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee, or of any person, or corporation having an interest in the subject of insurance, other than the interest of the insured, as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached or appended hereto."

XVII.

Your petitioner is advised and believes that the said judgment of the Circuit Court of Appeals in said cause is erroneous, and that this Honorable Court should require the said cause to be certified to it for its review and determination under and in conformity with the provisions of the 6th section of the act of Congress, entitled "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the Courts of the

United States, and for other purposes." Approved March 3d, 1891; the said case being made final in the said Circuit Court of Appeals by the said act, jurisdiction being acquired solely by virtue of the diverse citizenship of the parties.

XVIII.

The importance and gravity of the questions involved will be recognized when it is considered that an important principle of commercial (insurance) law is involved in the construction to be given to the mortgage clause and policy of insurance in settling the contractual rights of the several parties thereto and thereunder. The principle is involved not only in the case at bar, and is of importance not to your petitioner alone, but to underwriters in general.

The question first presented is whether the insurance can be supported by virtue of the collateral interest only of a payee under the mortgage clause when the party to whom the policy is issued has at and from the inception of the contract no interest in the property, and whether the mortgage clause is to be regarded as collateral to the policy itself or whether it constitutes of itself a principal contract for insurance based directly and primarily upon the interest of the mortgagee or payee. It involves questions of insurable interest which are novel to this Court. The use of the so-called "mortgage clause" has become so widespread in current underwriting as to be involved in insurance transactions of great magnitude, aggregating, it may safely be said, many millions of dollars on

properties diversely located within the jurisdiction of all of the various Federal Courts of the United States.

The form of policy involved and concerning which a construction is sought, has been sanctioned by legislative enactment, and its use made compulsory by statute, not only in the State of New York, but in Pennsylvania, New Jersey, Michigan, North Dakota, South Dakota and Wisconsin, and has been adopted by insurance companies in general for use in the majority of the other States of the Union and in Canada.

The following statistics will indicate the extended use and importance of this form of contract: In the states named in which the policy is adopted by legislative act, the latest accessible statistics show a population of 16,992,000, or more than one-fourth that of the whole United States. The assessed valuation of real and personal property in those States is $9,043,143,000, or more than one-third of the entire assessed valuation of the United States. The amount of real estate mortgages in the States named amounted to $2,787,746,000, or nearly one-half of the mortgaged property of the United States, and the fire insurance written upon property in those States (in 1893) amounted to $5,023,951,000, or about one-half of the entire amount of fire insurance written in the United States.

The use in underwriting of the policy of fire insurance "with the mortgage clause attached" is a gradual development and evolution of a century of underwriting. The combination of these two instruments into one contract is an anomaly to the law of contracts and peculiar to the business of fire

insurance. It is of necessary use in its present form to meet the exigencies and peculiarities of the business of fire insurance. It has a reason and foundation in principles of underwriting, the preservation of which are essential to the integrity of the business, and its significance and purpose and importance may be recognized and appreciated only by due consideration of the history of underwriting as connected with the insurance of collateral interests. Insurances directly upon the interests of mortgagees, and on other collateral interests, are eschewed by underwriters, because they leave the door open to double insurances beyond the insurable value of properties, and thereby add to the moral hazard involved to a degree which renders that form of insurances particularly dangerous and impolitic.

The subject, therefore, is one deserving of grave consideration.

The widespread use of the policy and mortgage clause attached makes it of great importance that there should be a uniformity in the decisions of the various Federal Courts before whom these contracts are in recent years being brought with growing frequency. The only way in which that uniformity of decision can be secured is by a consideration of this peculiar contract in its various aspects by this Honorable Court, and an authoritative declaration made as to the purpose, interpretation and construction of the contract, which shall stand as a guide to all inferior tribunals. This Court has at no time had before it for consideration contracts of this kind, and has never announced an opinion in regard to the construction thereof.

XIX.

Another important consideration which is presented in this case is the question of the nature and extent of the insurable interest acquired under an uncompleted agreement or negotiation for the purchase of collateral securities; and the extent to which an inchoate interest in a promissory note or chose in action, the nature of which interest is undisclosed and unknown to the insurer, will support an insurance which requires that the interest of the insured thereunder shall be a sole and unconditional ownership.

XX.

A third important question affecting the rights of litigants in general is whether a plaintiff in error is entitled to a review by the Appellate Court of questions presented by the record in the manner and form in which your petitioner brought up for review the questions relating to the legal effect of the correspondence between the Trust Company and The Mortgage Security Company, upon which the Trust Company bases its claims to the ownership of the Gordon note and the insurable interest required to support in its favor the contract of insurance in suit. Upon this question the Circuit Court of Appeals is divided.

In this connection the question is also presented, as to whether the existence of the insurable interest required by the insurance is to be determined from the correspondence as a question of fact, or whether it is a question of law; and in

general, whether the legal rights and obligations of parties which are to be determined wholly from writings in evidence present questions of law to be determined by the Court, or mere questions of fact; the Circuit Court of Appeals holding that questions of fact only are thus presented.

Your petitioner respectfully submits that under sections 700 and 649, Revised Statutes, the questions involving the construction of this correspondence are properly presented for review in the Appellate Court, contrary to the holding of the majority of the Circuit Court of Appeals.

XXI.

The decision of the Circuit Court of Appeals, holding that the rights of the Trust Company under the mortgage clause are not affected by the fact that the assured under the policy had no interest in the property at the time the mortgage clause was attached, is based upon the decision of Syndicate Insurance Company vs. Bohn, 12th Circuit Court of Appeals, 531, which your petitioner is advised and respectfully submits is a grave misapprehension and an erroneous statement of the law and an erroneous interpretation of the contract in question, and is in conflict with the previous decisions of other Courts of great respectability and authority. It is the only decision rendered and published of which your petitioner is aware, in any Federal Court upon the question as to the effect which an absolute want of interest in the property on the part of the person insured at the inception of the contract will have

upon the collateral rights of the mortgagee or Trustee under a mortgage clause.

XXII.

You petitioner thus respectfully submits that the questions involved in and presented by the said case of your petitioner should be authoritatively and finally adjudged by this Honorable Court, upon and after a full presentation to the Court of the merits of the said questions on the part of your petitioner, and of the defendant in error, The International Trust Company.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals, for the Eighth Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record, and all proceedings of the said Court of Appeals in the said case therein, entitled The Insurance Company of North America, Plaintiff in Error, vs. The International Trust Company, Defendant in Error, No. 660, to the end that the said case may be reviewed and determined by this Court as provided in Section 6 of the act of Congress entitled "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes." Approved March 3d, 1891; or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem proper, and in conformity with the said act, and that the said

judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court. And your petitioner will ever pray, etc.

EBENEZER T. WELLS,
MORTIMER F. TAYLOR,
SYLVESTER G. WILLIAMS,
Attorneys for Petitioner.

STATE OF COLORADO } ss.
County of Arapahoe. }

Sylvester G. Williams, being duly sworn, says that he is one of the attorneys for The Insurance Company of North America, the petitioner above named, and as such has had personal charge for the said petitioner of the case in the foregoing petition mentioned, in the Circuit Court of the United States for the District of Colorado, and in the Circuit Court of Appeals for the Eighth Circuit; that he read the said petition by him subscribed, and that the facts therein stated are true to the best of his information and belief.

SYLVESTER G. WILLIAMS.

Sworn to and subscribed before me this 20. day of February, 189 6.

My commision expires July 5th, 1897.

R. E. HALL,
Notary Public.

IN

The Supreme Court

OF THE

United States.

OCTOBER TERM, 1895.

The Insurance Company of North America,
Plaintiff in Error,
vs.
International Trust Company,
Defendant in Error.

ON PETITION FOR WRIT OF CERTIORARI.

To Messrs. A. C. Campbell and A. E. Pattison, Attorneys for The International Trust Company:

Please take notice that on the Ninth. day of March, A. D. 1896, at the opening of the Court, or as soon thereafter as counsel can be heard, the petition in the above entitled cause for a writ of certiorari, of which a copy is herewith furnished you,

will be submitted to the Supreme Court of the United States for the decision of the said Court thereon.

SYLVESTER G. WILLIAMS,
EBENEZER T. WELLS,
MORTIMER F. TAYLOR.
Attorneys for The Insurance Company of North America.

Service and copy of the within notice, and also of the petition for writ of certiorari received and acknowledged this 20." day of February, 1896.

A. E. PATTISON,
Attorney for International Trust Company.

MAR 9 1896
JAMES H. McKENNEY,
CLERK.

IN

The Supreme Court

OF THE

United States.

OCTOBER TERM, 1895.

THE INSURANCE COMPANY OF NORTH AMERICA,
Plaintiff in Error,

v.

THE INTERNATIONAL TRUST COMPANY,
Defendant in Error.

No. 906.

BRIEF OF PETITIONER, UPON PETITION OF THE INSURANCE COMPANY OF NORTH AMERICA FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SYLVESTER G. WILLIAMS,
EBENEZER T. WELLS,
MORTIMER F. TAYLOR,
Attorneys for Petitioner.

IN

The Supreme Court

OF THE

United States.

OCTOBER TERM, 1895.

THE INSURANCE COMPANY OF NORTH AMERICA,
Plaintiff in Error,

v.

THE INTERNATIONAL TRUST COMPANY,
Defendant in Error.

No. 906.

BRIEF OF PETITIONER, UPON PETITION OF THE INSURANCE COMPANY OF NORTH AMERICA FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

This petition for a writ of certiorari asks this Honorable Court to cause the Circuit Court of Ap-

peals for the Eighth Circuit to certify to this Court for its review and determination the above-entitled cause.

The grounds upon which the petition is based are very fully set out in the petition itself, to which we refer for a more complete statement of the case.

It should be observed in general that under the Act of 1891, establishing Circuit Courts of Appeals, practically no question relating to the construction of insurance contracts, however important, can be brought for review before this Court save by proceeding in certiorari. The act referred to practically shuts out from the consideration of this Court all questions belonging to the domain of insurance law, unless they be entertained by this Court in the manner here requested. Thus, a particular attention would seem to be merited to cases of this class, belonging to a branch of commercial enterprise and activity so vast in its proportions and involving interests of so great magnitude.

The writ, if granted, would bring up for review the decisions, State and Federal, in conflict with the decision of the Court of Appeals in the case at bar, as to the questions here presented.

In this brief we desire to present for the consideration of this Court such a review of the questions involved and the authorities bearing thereon as shall enable this Court to determine whether the matters involved are of sufficient gravity and general importance, and present questions of such novelty and difficulty as to merit the granting of the writ prayed for.

If the brief is more exhaustive than the practice demands for the purposes of the present pro-

ceeding, it will, we may assume, be none the less effective on that score for the purpose for which it is here presented.

This is a suit at law upon a policy of fire insurance issued July 6, 1893, by the petitioner to one John R. Gordon, with mortgage clause attached, as set out in the petition. The case was tried to the Court without a jury. The trial Court made a number of special findings of fact.

It is contended by the petitioner (1) that upon those findings (assuming that they are conclusive upon this Court) a judgment for the plaintiff below could not be predicated. That the findings themselves show that the petitioner is entitled to a judgment.

It is also contended (2) that material findings of the trial court are mere conclusions of law by which the trial court held that the certain letters and cablegrams introduced in evidence constituted and effected a repurchase by the Trust Company of the John R. Gordon note from the Investor's Company, and a revesting of the title and ownership in the Trust Company to the said note.

The petitioner will further contend (3) that by virtue of the motion made by the petitioner, defendant below, for a judgment upon the evidence at the close of the evidence and by the rulings asked of the trial court, the petitioner was entitled of right to a review by the Court of Appeals of the evidence, to determine whether the letters and cablegrams did constitute in law a repurchase of the note, they being the sole evidence of such repurchase.

I.

The insured, Gordon, to whom the policy was issued, had no interest in the property. The mortgage clause did not constitute an insurance of The International Trust Company.

The first proposition we have here to submit, as one of general interest and importance in the law of insurance, is based upon facts disclosed in the findings of facts made by the trial court. From these findings it appears that on July 6, 1893, when the policy of defendant company was issued to John R. Gordon, Gordon had no interest in the property. That this fact was not disclosed to the defendant company until after the fire. All transactions, therefore, had by the defendant company regarding the policy of insurance upon which the suit is based, were had in ignorance of the fact that Gordon had no interest whatever in the property. Gordon sold and transferred the property on July 3, 1893, to The Mesa Hotel and Improvement Company.

This case involves, accordingly, a determination and definition of the purpose, scope and legal effect of what is known and designated in current underwriting as "the mortgage clause." It is of much concern and manifest importance to underwriters generally, as well as to the insuring public, that it should be clearly determined whether or not this so-called mortgage clause is to be interpreted and treated as a species of collateral security, or whether it is to be regarded as an independent and direct insurance of the person named in the mortgage clause.

As indicated in the petition for this writ, the use of this mortgage clause in the business of fire insurance has become widespread, and the mortgage clause has come to be used in underwriting so extensively as would seem to render the questions thus presented of such gravity and importance as to warrant the consideration of this Court.

Not only are the questions presented of general interest, but they present an aspect of the fire insurance contract which is novel to this Court. An authoritative declaration, therefore, from this Court, of the legal effect of the mortgage clause attached to a policy of fire insurance will be of great utility and value in the business of fire underwriting, and tend to establish a uniformity in the decisions in reference thereto.

The plaintiff in error, the petitioner herein, contends on the one hand that the mortgage clause is a form of collateral security, which presupposes in the first instance and depends upon the interest in the property of the person named as the insured in the policy; that that interest affords the basis for the insurance; that notwithstanding the exemptions contained in the mortgage clause, the insurance is primarily that of the mortgagor or owner of the property, and as such is set over or assigned, as collateral security, to the designated mortgagee or trustee, or *cestui que trust*, as the case may be; that the "owner of the policy," at whose request by the language of this mortgage clause itself, the insurance is made payable in case of loss to the *cestui que trust*, is the person named in the policy as the assured (in this instance, John R. Gordon), and that all rights, primary and derivative, to the benefit of the insur-

ance flow in the first instance through him; that the mortgagor continues to be the insured and the owner of the policy, to whom the insurance will revert on payment of the mortgage debt; that whatever exemptions the mortgage clause contains favorable to the designated payee, relate to acts of the mortgagor which may be done *after* the attaching of the mortgage clause, and by which the insurance might thereafter become forfeited or invalidated; but that the provisions of the mortgage clause are not effective to validate an insurance which had no validity in its inception by reason of the fact that the person insured and designated as owner of the policy and of the property had, to start with, no interest whatever in the property.

The defendant in error contends, on the other hand, that the mortgage clause attached to the policy is designed to be an insurance directly upon the interest of the mortgagee, trustee, or *cestui que trust*, to whomsoever the insurance is made payable, and that it requires for its support no interest whatever in the assured named in the policy; and that the party named in the mortgage clause takes the insurance free from all equities which existed at and prior to the time the mortgage clause was attached. This latter view is adopted by the Court of Appeals, and we submit that it is a mistaken view and a misapprehension of the purpose, scope and legal effect of the instrument in question; that it is based upon scant and doubtful authority, while the better authority and reason of the case sustain the views of the appellee, the petitioner.

No question is presented here as to whether the interest of a mortgagee or trustee or of a *cestui que*

trust may not be made the subject of insurance. It goes without saying that such might be, if the insurer saw fit to insure any one of those interests, as such. But where the insurer has not seen fit to do that, a *cestui que trust* cannot, merely because of the nature of his interest in the property, claim the benefit of the insurance.

That a mortgagee, as such, has no right to insurance effected by the mortgagor, is well established by all the authorities.

As stated by this Court in Carpenter vs. Providence Washington Insurance Co., 16 Peters, 495, quoting from Columbian Insurance Co. vs. Lawrence, 10 Peters, 512: "We know of no principle of law or equity by which a mortgagee has a right to claim the benefit of a policy underwritten for the mortgagor on the mortgaged premises in case of a loss by fire. It is not attached or an incident to his mortgage; it is strictly a personal contract for the benefit of the mortgagor to which the mortgagee has no more title than any other creditor."

No more can the *cestui que trust* claim, by virtue of his own collateral interest in the property, any contractual right as against the insurer under the insurance of the mortgagor. If the mortgagee is designated as payee under the policy, his right as an appointee to receive the insurance money emanates from the contractual rights of the mortgagor arising out of the contract of the latter with the insuring company. And it follows that whatever additional rights he may acquire by virtue of a mortgage clause are "tacked on" to the original contract between the mortgagor and insurer. They do not supplant or destroy the original contract, but give to the payee addi-

tional rights and immunities with respect to that contract.

These rights under the mortgage clause are considerable. They afford an enlarged security; they go to amplify, favorably to the appointee, that portion of the clause which merely declares that the loss shall be payable to the appointee named. But the clause, with all of its provisions, still remains far enough removed from an absolute assignment of the policy, such as would go with the assignment of the property itself, and which, if consented to by the insurer, would constitute a new insurance immediately thenceforth upon the interest of the assignee.

We proceed accordingly to locate the mortgage clause as occupying a distinctly middle ground between a naked appointment of a designated person to receive the insurance fund in case of loss, and an absolute assignment of the insurance contract; partaking to some extent of the nature of both of these, it is nevertheless neither the one nor the other.

This leads to the consideration of the subject of the assignment of policies of fire insurance, a subject which has been extensively treated in the authorities. An assignment of a policy of insurance, as collateral security, simply by making the insurance payable to the mortgagee or trustee or *cestui que trust*, without any terms, conditions or exemptions, constitutes the payee named a mere appointee to receive the insurance money in case of loss; but the insurance remains subject to and forfeitable by any of the acts of the mortgagor which are forbidden by the terms of the insurance. This is so well established as to hardly need the citation of authorities.

Bates vs. Equitable Ins. Co., 10 Wall., 33.
Carpenter vs. Providence-Washington Ins. Co., 16 Pet., 495.
Fogg vs. Middlesex Ins. Co., 10 Cush., 337.
Grosvenor vs. Atlantic Ins. Co., 17 N. Y., 391, 394.
Continental Ins. Co. vs. Hulman, 92 Ill., 145.

An absolute assignment of the policy on the other hand, coupled with a transfer of the property and consented to by the insurer, is the complete divesting of the interest in the insurance of the party originally insured. It constitutes a complete novation and substitution of the parties.

But even in the case of an absolute assignment, many authorities hold that the assignment does not purge the contract from a forfeiture existing at the time the assignment is made. "That the assignee takes no new contract free of the *past*, but simply steps into the shoes of the assignor and for the future is substituted for him."

2 May on Insurance, section 378A, page 840.

Thus in Reid vs. Ins. Company, 54 Vermont, 413-16, the policy was originally issued to Robert A. Reid, who did not have a title in fee simple, unencumbered, to the property, contrary to the provisions of the policy. Subsequently the policy was assigned to the plaintiff and confirmed by the company. The right of the plaintiff to recover was resisted on the ground that Robert Reid did not have the title required. The Court, in defining the legal relations that subsisted between the plaintiff, as the assignee of said policy, and the defendant company,

said: "The plaintiff claims that by virtue of the approval of the assignment and confirmation of the policy to him, the defendant is estopped from denying its liability on account of anything that transpired between the insured and the insurer at the time the contract was entered into, or from setting up any act done by the insured after the policy was issued, *and before said assignment*, as a defense. The defendant claims that said approval and confirmation by it, in legal effect, was merely a substitution of the assignee for the party insured by the policy, and that the assignee only took the interest that his assignor had in the contract, subject to any defenses that might be made to it in the hands of the assignor.

"The policy was a chose in action, and all the interest that the assignor could convey by an assignment of it was the right to demand compensation from the defendant in case the property insured by the policy should be burned during its continuance, so that, independently of the approval of the assignment and confirmation of the policy to the plaintiff, the rules of law that determine and fix the rights of assignee and payor will be applicable here. By the approval of the assignment the company simply signified consent to its being made, and by the confirmation of the policy, agreed that it would accept and become liable to the assignee in place of the party to whom the policy was issued. By such approval and confirmation the defendant did not waive any right that it then had, or might thereafter have, to make any defense to any claim that might be made against it under the contract entered into with Robert A. Reid (assignor) and evidenced by the policy assigned. The approval and confirmation was not

evidence tending to show that the defendant entered into any new contract by which any new liability was incurred to the plaintiff. The approval of said assignment and the confirmation of the policy, then, being in legal effect the substitution of the assignee for the assignor, any defense existing at the time the assignment was approved and the policy confirmed that would have been available if suit had been brought in the name and for the benefit of the party to whom the policy was issued, is equally available against the assignee."

In the case of Eastman vs. Carroll County Mut. Fire Ins. Co., 45 Maine, 307, the policy was issued to one Ramsell. At the time the policy was issued Ramsell was not the owner of the property, but the title was in one Jameson. Subsequently Jameson conveyed the property to the plaintiff, and the policy of insurance was assigned to the plaintiff by Ramsell with the consent of the company. It was held that from the application made by Ramsell, and from the recitals in the assignment, the directors, at the time they consented to the transfer, had good reason to believe that the policy was then valid, and that by the written consent of the directors to the assignment of the policy in suit, the defendant company did not thereby ratify or confirm the assignment so as to make the policy which was conceded to have been originally void, a valid contract in the hands of the plaintiff.

In the case of Citizens' Fire Insurance Co. vs. Doll, 35 Md., 89, the firm to whom the policy was issued were not the owners of the property within the terms and requirements of the policy. The policy was subsequently, however, assigned to Doll, who at

the same time derived the ownership of the property from the real owner at the time the policy was obtained. The policy provided, as in the case at bar, "that if the interest of the assured in the property is not truly stated in the policy, or if the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property, it must be so represented to the assurers and so expressed in the written part of the policy or else the policy to be void."

It being admitted that the policy was void as to the original insured, the Court said: "This difficulty in the case, however, is sought to be obviated and removed, upon the theory that the assignment of the policy to the appellee with the assent of the appellant operated as, and constituted in fact and in law, a new contract between the parties to this cause, and that all antecedent causes for voiding the policy are excluded. But to this proposition we cannot assent as being applicable to a case like the present, if it can be applied to any case, in the sense and to the extent contended for by the appellee in this case. The risk contemplated by the policy never attached, because of the violation of the conditions which were fundamental to the contract; the policy was void in its very inception. The parties making the assignment had no interest at the time in the subject of the policy, and having no interest themselves, they could assign none. The policy, if void in their hands, was equally so in the hands of the assignee, who is one of the parties to whom the policy issued, and by whose misrepresentations it was rendered void from the beginning. The mere assent of the assurers to the assignment gave no force and vitality to the policy that

was before utterly void in the hands of the assignors. The policy was not assignable without such assent; the object of obtaining it was simply to authorize the transfer for what the policy was worth. By such assent the assurers only agreed to substitute the assignee in place of the assignors, but the causes that operated to render the policy void in its inception still adhered to it, and affected it in the hands of the assignee. He could occupy no better position than the assignors in reference to the policy unless it be by said contract with the assurers. It is true, as stated by writers of approved authority, that, "If the assignment, taken in connection with the policy, plainly transfers the assured's *whole interest*, the underwriter's assent is evidently equivalent to his agreement to be directly answerable to the assignee. In such case the proceedings to enforce payment may be in the assignee's name and be becomes to all intents and purposes the substituted party to the contract. But this, as is manifest, pre-supposes that the policy was at the time of assignment valid and operative; that the assured held such interest in the subject matter of the insurance as was assignable and sufficient to keep alive and subsisting the policy according to the terms and conditions upon which it was issued.

"This was far from being the case in this instance. The policy was simply void and the assent of the assurers to its assignment was neither intended nor operated to impart to it a validity and value that it never before had."

Citing,

State Mut. Fire Ins. Co. vs. Roberts, 31 Pennsylvania State, 438.

See, also,

Ellis vs. State Ins. Co., 68 Ia., 578.

The foregoing authorities thus hold that even an absolute assignment of the policy and confirmation thereof by the insurers, whatever may be the effect as to the future rights of the assignee, do not have the effect to validate a void policy. And we shall show hereafter that the rule is applicable with even greater force to the case of the mortgage clause, and that it has been so treated by the authorities.

As further preliminary, however, to a consideration of the mortgage clause, as such, and for a more complete understanding of the nature of that clause and the rights created by it, we proceed to consider the subject of the assignment of a policy for purposes of collateral security as it has been treated by the authorities.

The ordinary form in which the benefit of fire insurance was made available to mortgagees and creditors, prior to the introduction of the mortgage clause now in current use, was to endorse upon the policy the words "payable in case of loss to John Doe, mortgagee," or "loss, if any, payable to John Doe as his interest may appear," the policy being issued to and in the name of the owner of the property. This form of security received great attention from the courts, and the rights created thereby are very well defined in the authorities.

In the case of Bates vs. The Equitable Insurance Co., 10 Wallace, 33, the policy was issued originally to one Philbrick. Philbrick sold the property to Bates. The policy was endorsed as follows: "Payable in case of loss to E. C. Bates," and consent to

that endorsement was given in writing by the Secretary.

In passing upon the legal effect of the endorsement this Court said: "Now, it is a well-known and frequent thing in the insurance business for a person to insure his life or his property, and either in the policy itself or by endorsement at the time it is made, or by subsequent endorsement to which the consent of the company is generally required, to direct the loss to be paid to some third party, and this is done in language similar to if not identical with that used in this case. It is a mode of appointing that the loss of the party insured shall be paid by the company to such third person. This transaction is a very common mode of furnishing a species of security by a debtor to his creditor, who may be willing to trust to the debtor's honesty, his skill and success in trade, but who requires indemnity against such accidents as loss by fire or the perils of navigation. The property of the debtor at risk being thus insured for the benefit of the creditor gives him this indemnity.

"In the face of this frequent use of the two endorsements on the policy, it cannot be held that they imply themselves a knowledge of the *sale*, or *a consent to insure the purchaser* * * *. We can see in these endorsements nothing more than the direction of Philbrick, and the consent of the company, that any loss sustained by Philbrick covered by that policy should be paid to Bates. As Philbrick did not have any interest in the goods when the fire occurred, he sustained no loss, and the policy covered none."

In Carpenter vs. Providence Washington Insurance Co., 16 Peters, 495, this Court again says:

"If, then, a mortgagor procures a policy on the property against fire and he afterwards assigns the policy to the mortgagee with the consent of the underwriters (if that is required by the contract to give it validity), as collateral security, that assignment operates wholly as an equitable transfer of the policy so as to enable the mortgagee to recover the amount due in case of loss; but it does not displace the interest of the mortgagor in the premises insured. On the contrary, the insurance is still his insurance, and on his property, and for his account. And so essential is this, that if the mortgagor should transfer the property to a third person without the consent of the underwriters, so as to divest all of his interest therein, and then a loss should occur, no recovery can be had therefor against the underwriters, because the assured has ceased to have any interest therein, and the purchaser has no right or interest in the policy." And again, further on, the Court says: "It is clear, both upon principle and authority, that an assignment of a policy by the insured only covers such interest in the premises as he may have at the time of the insurance and at the time of the loss. It is the property of the insured, and his alone, that is designed to be covered; and when he parts with his title to the property, he can sustain no future loss or damage by fire; but the loss, if any, must be that of his grantee. The rights of the assignee cannot be more extensive under the policy than the rights of the assignor. And as the grantee of the property, he can take nothing by the grant in the policy, since it is not in any just or legal sense attached to the property or any interest therein."

And again, page —, the Court says: "An insur-

ance of a mortgagor and one of a mortgagee involve very different considerations, responsibilities, rights and duties, and the company might well be willing to make an insurance upon the property on account of the mortgagors, and they might be unwilling to make any on account of the mortgagee. And it is clear upon principle, that no policy can or ought to be deemed a policy exclusively on the interest of the mortgagee, unless the company have notice that it is so designed, and they assent to it. A mortgage interest is without doubt an insurable interest; but then it is a special interest, and should be made known to the underwriters."

And again, page —: "The language of Lord King and Lord Hardwicke, and of this Court in the cases already cited, show conclusively that policies of this sort are not in their nature incidents to the property insured, but that they are mere special agreements with the persons insuring, against such loss or damage as they may sustain, and not the loss or damage that any other person having an interest as grantee or mortgagee or creditor or otherwise, may sustain by reason of a subsequent destruction thereof by fire."

In the case of Fogg vs. Middlesex Mutual Fire Insurance Co., 10 Cushing, 337 (Mass.), the Supreme Judicial Court of Massachusetts, by Shaw, C. J., speaking of the different modes of assignment and their effect, says, page —: "But there is another species of assignment or transfer, it may be called, in the nature of an assignment of a chose in action. It is this: 'In case of loss, pay the amount to A. B.' It is a contingent order or assignment of the money, should the event happen upon which money will be-

come due on the contract. If the insurer assents to it, and the event happens, such assignee may maintain an action in his own name, because, upon notice of the assignment, the insurer has agreed to pay the assignee instead of the assignor; but the original contract remains. The assignment and assent to it form *a new and derivative contract* out of the original. But the contract remains as a contract of guaranty to the original insured; he must have an insurable interest in the property, and the property must be his at the time of the loss. The assignee has no insurable interest *prima facie* in the property burned, and does not recover as the party insured, but as the assignee of the party who has an insurable interest, and a right to recover, which right he has transferred to the assignee with the consent of the insurers."

In the case of Grosvenor vs. Atlantic Insurance Co., 17 New York, 391, in which the policy provided that in case of loss such loss should be payable to the plaintiff, the Court, in passing upon the legal effect of this provision, by Harris, J., said: "I agree with the Court below, that there is nothing in the language of the policy on which the Court can adjudge that in legal effect it is a contract insuring the interest of the mortgagee as such, except in the provision which declares that the loss, if any, which occurs under the contract insuring the mortgagor's interest shall be payable to the mortgagee. That provision merely designates a person to whom such loss is to be paid, and shows that he is a person who may have an interest in its being so paid.

"The undertaking to pay the plaintiff was an undertaking collateral to and dependent upon the

principal undertaking to insure the mortgagor. The effect of it was, that the defendants agreed that whenever any money should become due to the mortgagor upon the contract of insurance, they would instead of paying it to the mortgagor himself, pay it to the plaintiff. The mortgagor must sustain a loss for which the insurers were liable before the party appointed to receive the money would have a right to claim it. It is the damage sustained by the party insured, and not by the party appointed to receive payment, that is recoverable from the insurer * * * There is no just ground for discrimination between this case and that of an assignment of the policy to a mortgagee to be held by him as collateral security for his debt, with the consent of the insurer. In either case the insurance is upon the interest of the mortgagor, the terms and conditions upon which idemnity may be claimed are agreed upon, and then the original parties further agree that when by the terms and conditions of the contract the insurer shall become liable by reason of a loss sustained by the party insured, the money shall be paid, not to the party who has sustained the loss, but to his appointee or assignee for his benefit. Such an appointment or assignment ought not to be construed so as to vary in any respect the liabilities of the insurers upon their original contract."

In the case of Continental Insurance Co. vs. Hulman & Cox, a case in which the Honorable Chief Justice of this Court was counsel, the endorsement upon the policy was: "Loss, if any, payable to Messrs. Hulman & Cox, of Terre Haute, Indiana, Mortgagees, as interest may appear." And the Court, by Mr. Justice Sheldon, said, page 154: "Mak-

ing the loss, if any, payable to Hulman & Cox, Mortgagees, was not an insurance of their mortgage interest in the property. As said in Flanders on Fire Insurance, page 441: 'It is merely a designation of the person to whom it is to be paid, and is not an assignment of the policy. Hence, it is the damage sustained by the party insured and not by the party appointed to receive payment that is recoverable from the insurers. The insurance being upon the interest of the insured, if he parts with that interest before the fire, no loss is sustained by him, and of course none is recoverable by his assignee or appointee. In other words, a policy made payable to A in case of loss is an agreement on the part of the insurers that A shall recover whatever the person originally insured may be entitled to recover in case of loss; that is, it is a contingent order or assignment of what may become due under the contract; and is not an absolute transfer by virtue of which the assignee acquires the full rights of an assignee of a chose in action.'"

Many other cases may be cited to the effect that a policy of insurance issued to a mortgagor of real estate, and made payable to the mortgagee in case of loss, is an insurance of the interest of the mortgagor in the estate and not of the interest of the mortgagee.

Baldwin vs. Phoenix Ins. Co., 60 N. H., 164
Macomber vs. Cambridge Mut. Fire Ins. Co., 8 Cush., Mass., 137.
State Ins. Co. vs. Maackens, 9 Vroom., N. J., page 564.

This being established and the nature of an absolute assignment being also understood, what is to

be said with regard to the construction of the mortgage clause, which contains in addition to the loss payable clause the exemptions and conditions therein set out?

The view of the petitioner, the plaintiff in error in this case, is that the mortgage clause before us is but a modification of the loss payable clause. While it is amplified in favor of the payee and provides certain exemptions from the acts or neglect of the mortgagor, the insurance, nevertheless, is predicated upon the interest of the mortgagor, the insured named in the policy. From this source, if at all, the insurance takes validity in the first instance. While, from and after the time at which the mortgage clause takes effect, the interest of the mortgagee or trustee or *cestui que trust*, as the case may be, is not to be affected by the acts or neglect of the insured, and while the mortgage clause does contain an agreement between the insurance company and the payee, *in addition to that contained in the policy itself*, the contract under the mortgage clause is made with respect to the interest of the payee in the insurance which has been effected upon the interest of the insured in the property, and is not an insurance upon the interest, as such, of the payee in the property. The mortgage clause, while it contains in one sense an independent agreement, is not an independent or new contract of insurance; it is by no means identical with a policy of insurance issued directly to the mortgagee upon the mortgagee's interest in the property.

Taken by itself the mortgage clause would be an unintelligible instrument; taken with the policy, and still an undertaking is presented anomalous to the general law of contracts. But it is not possible to

class such a contract with policies issued directly to a mortgagee, or with insurances upon the mortgagee's interest as such.

The case of Hastings vs. Westchester Irs. Co., 73 N. Y., 141, is the case relied upon by the Court of Appeals, and furnishes the supposed precedent for the case of Syndicate Ins. Co. vs. Bohn, (also decided by the Circuit Court of Appeals of this, the Eighth, Circuit), which in turn is the precedent taken for the case at bar.

The Hastings case is repeatedly referred to in the Bohn case as holding that by the contract relation created between the insurer and the payee under the mortgage clause, the mortgage agreement is a distinct and independent contract of insurance.

But in the case of Meriden Savings Bank vs. Home Mut. Ins. Co., 50 Conn., 396, the general nature of the agreement is differently stated. There was an agreement made between the bank and the insurance company, for a consideration, whereby it was provided in respect to policies of the defendant company which the bank might hold payable to it as collateral security, that no act of the owner under any policy should invalidate the insurance as to the bank.

The Court, referring to the Hastings case, says: "We do not, however, at this time and in this case, go quite so far as that seems to go, and hold that the mortgage agreement is a distinct and independent contract of insurance. It is rather an agreement relating to an existing policy by which certain conditions are dispensed with and certain privileges are secured to the insurers which they would not otherwise have, and the plaintiffs are made a party to the contract of insurance."

The case of Hastings vs. Westchester Insurance Company, affords substantially the whole foundation for the decision of the Circuit Court of Appeals in the case at bar, as will be found by reference to the case of Syndicate Ins. Co. vs. Bohn. The Bohn case it will be found, rests broadly and wholly upon the authority of the Hastings case, and holds that where the insured under the policy had no interest in the property at the time the insurance was effected, the right of a mortgagee to recover under the mortgage clause is not affected.

But the Hastings case upon the facts, is not in point. The facts and questions involved were very different from those in the case at bar. The only question in that case was whether the defendant was entitled to contribution from other insurance taken out by the insured, *with the consent of the defendant company*, prior to the attaching of the mortgage clause, but which other insurance was not payable to the plaintiff; and the point decided was that the defendant company was not entitled to contribution from the other existing insurance. The question was not in any way involved as to what effect a want of interest in the property on the part of the person insured under the policy would have upon the rights of the mortgagee under the mortgage clause, nor was there any question presented at all about the validity of the policy.

We submit that the Hastings case does not furnish a sufficient authority for the decision rendered by the Court of Appeals in the case at bar or in the Bohn case. A reference to the Hastings case will show not only that the point involved in the case at bar was not in issue in that case, but furthermore

that that case was decided by a mere majority of a divided Court, Judges Allen, Folger and Andrews dissenting.

But, again, we find in a much later case, decided by the New York Court of Appeals, *in which all of the judges concur*, it is held that a misrepresentation as to ownership at the time the policy is taken out is a complete defense to an action brought by the payee under the mortgage clause. The latter case is a complete refutation of the claim that the Hastings case was intended to apply to a case of this sort. We now refer to the case of Graham vs. Firemans Ins. Co., 87 N. Y., 69. A policy was issued running to the owner of the property, with the mortgage clause attached. In that case the Court held that if there is a breach of warranty or a misrepresentation as to the owner of the property, the special mortgage clause will not relieve the mortgagee from the effect of the breach of warranty, though it provides that as to the interest of the mortgagee the insurance shall not be invalidated by any act or neglect of the mortgagor or owner. It was represented that the owner of the property was the widow of a Captain Jack, whereas, she was in fact an infant daughter. The Court says that "The mortgage clause, exempting the mortgagee from the acts or neglect of the owner of the property, contemplates a case where the owner could act or neglect, and that a policy obtained through misrepresentation as to the owner cannot fairly be considered as embraced within the meaning of the clause referred to; nor can such misrepresentation be regarded of itself as an act or neglect within the terms of the policy."

So it would seem that in the case at bar, as

Gordon had no ownership or title at all to the property when it was issued—and this fact was not disclosed to the defendant insurance company—*the policy was void for breach of warranty of ownership;* nor can such breach of warranty, existing when the contract is made, be regarded as an act or neglect within the terms of the clause.

It will be noted, furthermore, that it is not an act or neglect of the owner of the property which is objected to in this case, or which affords the basis of this defense. The owner of the property was The Mesa Hotel and Improvement Company. The defense is, that John R. Gordon, the insured named in the policy, was not the owner at all; wherefore the policy did not attach.

In the Graham case, counsel for appellant cited as authority, the case of Hastings vs. The Westchester Insurance Co.; but the Court of Appeals expressly stated that the authorities cited were not applicable to the question involved. The opinion, in both the Graham case and the Hastings case, was written by Judge Miller, and the Hastings case, we may accordingly assume, could not have been understood by that Court as intended to cover the question now under consideration.

In the case of Omnium Securities Company vs. Canada Fire and Marine Insurance Co., 1st Ontario, 497, we have an important case, and one directly in point. In that case it is held that the mortgage clause does not prevent the defendants from impeaching the policy as being obtained by fraud or misrepresentation; that it does not touch or affect the case of defects in the original contract of insurance, but points only to the future; that it does not

condone undiscovered fraud or warrant the policy to be conclusively binding at the time of this bargain. This case follows the Graham case, to which it refers with full approval.

The policy was effected by one McMahon. The mortgage clause attached provided, as in the case at bar, as follows: "It is hereby agreed that this insurance as to the interest of the mortgagee only therein shall not be invalidated by any act or negligence of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy."

The Court said:

"Without entering into that not very clear subject of 'subrogation,' we may treat it on the intelligible ground of a special bargain made, after McMahon had insured his premises, with his mortgagees, to whom he had made the loss payable. For a consideration sufficient in their estimation, the insurance company agree with the mortgagee that, so far as his mortgage interest is concerned, this insurance shall not be invalidated by any act or negligence of the mortgagor or owner of the property insured, nor by any different or more hazardous occupation than the policy allows.

"It seems to me that this provision only points to the future, and that insurers are not thereby debarred from setting up that the insurance had been effected by fraud. I think, so far as any knowledge on their part extended, they should be held to have elected to treat it as a valid, subsisting insurance at the time of this bargain with the mortgagees.

"In an ordinary case of loss payable to the

mortgagee, we can understand the latter agreeing with the insurers thus: 'If you will protect me from losing the benefit of this from any act this mortgagor may do as to change of occupancy, or, in fact, from any act or neglect of his, I will make over my mortgage to you if you pay me the loss.' And the insurers agree thereto. I do not think that they thereby guarantee to him that his mortgagor has committed no such fraud upon them in effecting the insurance. They do not warrant it to be an indisputable risk.

"I do not consider the subsequent provision in the clause, that whenever they pay any sum for the loss, and shall claim that as to the mortgagor or owner no liability existed therefor, they shall be to the extent of payment subrogated to all the rights of the party to whom payment shall be made and to all his securities, can affect the question. * * * I do not see how the insurers can be held to condone undiscovered fraud or warrant the policy to be conclusively binding at the time of this bargain, any more than that they should insist that the mortgagee warranted the validity of the mortgage as to the title, value, etc." * * * "I feel great difficulty in holding this clause to amount to a new insurance, to all intents and purposes, by and with the mortgagees. I understand how in some cases where the policy has been assigned with the insurers' assent, it may be so held as to future avoidance by the acts of the assignor. See Burton vs. Gore District Mutual Insurance Co., 12 Gr., 156, qualified by Livingstone vs. Western Assurance Co (in appeal), 16 Gr., 9.

"None of our cases seem to touch the case of defects in the original contract of insurance, in con-

sequence of subsequently discovered fraud.

"Suppose there was actually none of the property proposed for insurance in existence, and the company had been imposed upon by virtue of documents or lying representations, if plaintiff's contention be sound, the insurers could not be heard asserting the fraud. But it is said in such a case there would be no actual insurance, as there was nothing to insure. I fail to see an intelligible distinction between such a case."

The Court then refers to the case of Graham vs. Fireman's Insurance Co., supra, and says: "This case is very important. * * * A policy was issued to Catherine E. Jack, represented to be the widow of Captain Jack, who was going to keep a first-class hotel. The policy insured Catherine E. Jack, loss if any, payable to plaintiff as mortgagee. A second policy was applied for. Plaintiff's agent said there was a mistake in the name; that it should be Margaret, but that the policy was the same. The first policy was altered accordingly, and the second issued to Margaret E. Jack. It turned out that she had the title, but was an infant three years old, with no general guardian. There was a clause in the policy exactly in the words of the clause in this case, as quoted in the first page of this judgment. The case was very fully argued, and the policies were held void for misrepresentation as to the ownership, and after discussing this mortgage clause, which was urged as completely sheltering the plaintiff, the mortgagee, the Court said that: "A policy obtained through misrepresentation as to the owner cannot fairly be considered as embraced within the meaning of the clause referred to, nor can such misrep-

resentation be regarded of itself as an act or neglect within the terms of the policy."

In the case of Doran vs. Franklin Fire Insurance Co., New York Court of Appeals, as reported in the 10th Ins. L. J., at page 843 (not fully reported in New York Reports), the Court, by Folger, C. J., speaking of the policy and mortgage clause, says: "The policy is an insurance of the owners and mortgagor's interest, loss if any, payable to the mortgagee. But there is an agreement by the insurer that if any act or omission of the owner takes place by which any condition of the policy is broken, and the policy voided by him, the insurer will not take advantage of that against the mortgagee; but will pay him the loss, reserving the right to the insurer that if it claims that there was such act or omission (which must mean that if it rightly so claims), it shall be subrogated to the rights of the mortgagee. *This is different from an insurance of the mortgage interest.* It is an insurance of the owner's interest, and the policy enures to his benefit at the outset, and so continues, unless some condition in it is broken."

In the case of Davis vs. German American Insurance Co., 135 Mass., 251, the Supreme Judicial Court of Massachusetts makes some valuable remarks upon the legal effect of the mortgage clause, attached to the policy under the following circumstances: The policy was issued to Putney, with the endorsement in the first instance "Payable, in case of loss, to Davis, Taylor & Demmon (the plaintiffs), to the extent of their interest." The policy had a provision against any change in title, sale or transfer of the property. Putney sold the property by absolute conveyance. Subsequently the plaintiffs who

held a mortgage upon the property foreclosed and took possession, and thereafter applied to the defendant insurance company and obtained the following endorsement upon the policy: "Boston, December 21st, 1878. Davis, Taylor & Demmon, the parties to whom this policy is payable in case of loss, being mortgagees, have entered for breach of the conditions of their said mortgage. It is understood and agreed that this policy shall attach and cover their interest as such. It is hereby agreed that this insurance as to the interest of the mortgagees only therein shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, etc."

Then follow the conditions of the mortgage clause whereby the mortgagees are to notify the company of any change of ownership, etc., and agree to pay for any increase of hazard and to subrogate the insurance company to the rights of the mortgagees under the securities in case of payment of loss. Under this contract, Davis et al. brought suit for loss. The Court held that the endorsement: "This policy shall attach and cover *their interests as such*," meant that "the promise previously made shall enure to the mortgagees' benefit in respect of the interest which they are supposed to have acquired by entry, as it previously attached *to the same interest in the hands of the mortgagor*." That the next provision of the mortgage clause, viz.: "'This insurance as to the interest of the mortgagees only therein shall not be invalidated by any act or neglect of the mortgagor,' * * * evidently assumes that the undertaking to the mortgagees is still *only derivative* and *cut out of the insurance of the mortgagor's interest*." "That the

agreement for subrogation * * * proceeds on the same assumption." The Court says: "The conclusion which we thus draw from the construction of the endorsement, as to the notion upon which it is framed, is fortified by extrinsic facts. The defendant is a New York Company, and the endorsement is drawn in what seems to be an established New York form.

Hastings vs. Westchester Ins. Company, 73 N. Y., 141.

"The language of more than one New York decision would appear at first sight to countenance the view in question. 'After forfeiture and condition broken the mortgagee, if he be in possession, is considered as having the legal estate. * * * It is true that in Hastings vs. Westchester Insurance Company, a very similar clause was differently construed. But the first two sentences of the present endorsement were absent in that case. * * * We are confirmed in the opinion that the interest referred to was not the hitherto uninsured interest which the mortgagees had always had from before the date of the policy, alongside of the mortgagor's interest which the policy covered, but was the same or a part of the same interest previously insured and now supposed to be transferred *from the mortgagor* to the mortgagees."

"If this, and this alone, is the interest referred to, the plaintiff's case is at an end, because the breach of condition and entry had not the supposed effect, and because, further, the mortgagor had no interest at the date of entry, she having alienated it before that time.

"If, however, the endorsement is to be construed

more broadly than is quite consistent with its words, and is to be taken as promising to insure the mortgagee's interest generally, which had been outstanding but uninsured up to that date, it equally fails to give any rights to the plaintiffs because it is without consideration. In this view there is no analogy to the case of a transfer of premises and policy. When that takes place the same interest continues to be insured, and the substitution of parties in the policy can be reconciled with the doctrine of consideration in more ways than one. But the endorsement worked no substitution of parties. The mortgagor was not a party to the transaction. Whatever rights she had before, she retained after it, and is contemplated as retaining by its terms. The whole argument for the mortgagees must be that by Massachusetts law they already had such a contractual or quasi-contractual relation with the defendant under the policy, by reason of its being made payable to them in case of loss to the extent of their interest, that the discharge of it was a sufficient consideration for a new contract with different terms as in other cases of substituted contracts.

"But this argument is unsound. In the first place there is no substitution of contracts; the purport of the policy and endorsement taken together upon the construction of the latter which we are now assuming, is that the original promise to pay the mortgagees in case of loss *upon the mortgagor's interest* is kept on foot, and that there is added to it a further promise to pay any loss upon the mortgagee's interest as well.

"In the first instance, even if it could be said with technical truth that the endorsement contained

the whole and only promise to the mortgagees, and was substituted for that on the face of the policy, still we should read it as embracing the whole of the original promise, and adding the further undertaking just mentioned, to pay any loss on the mortgagee's interest in the property. Taking it this way then and assuming that the plaintiffs stand in as good a position as if they were the original insured, we think the objection would remain that no consideration is shown. For without disputing that one contract may be substituted for another even when the consideration is executed by way of accord and satisfaction, the form of such transaction cannot be made to cover what is in substance adding a new and gratuitous promise to an existing agreement upon executed consideration.

"In Hastings vs. Westchester Ins. Co., above referred to, where this clause was treated by a majority of the Court as being in substance a new policy issued to the mortgagees, it is suggested by one of the justices that a stipulation for subrogation in certain cases, upon payment, to the legal rights of the mortgagees under their securities to the extent of such payment, is the consideration. But apart from any objections to this view, it appears to us that this is a wholly subordinate provision attached to a *contract assumed to derive its validity from other sources.* And that it can no more be regarded as the conventional inducement of the defendant's undertaking by a fair construction of the instrument than the requirements that the mortgagees shall notify the company of any change of ownership, etc., can be. Of course, if we look outside the paper, we know that contracts of insurance are not in fact and do not purport to

be founded on such casual incidents of performance on the insurer's part."

We quote thus extensively from the authorities to show that the view of the case at bar taken by the Court of Appeals, by which the contract in suit is held to be a direct insurance of The International Trust Company, it is a mistaken theory; that the only tenable and correct view is that the insurance is predicated upon the interest of John R. Gordon, the insured under the policy, as it was supposed and contemplated to exist at the inception of the contract; that the provisions of the mortgage clause providing that the insurance shall not be invalidated by any act or neglect of the mortgagor, etc., point only to the future, and do not "condone undiscovered fraud or warrant the policy to be conclusively binding at the time of this bargain."

The purport of the exemption in the mortgage clause of the trustee from the effects of a change of ownership of the property is simply that the contract, launched upon the Gordon interest, shall not be invalidated as to the Trustee in case the Gordon interest shall be transferred to another.

The proposition that the mortgage clause contains an independent contract with the party therein designated, need not be disputed; nor is that proposition inconsistent with the position here taken. It does not follow therefrom that the mortgage clause is an insurance of the payee thereunder or an insurance upon his interest in the property. The new and independent contract is an agreement made with respect to the already existing contract or policy of insurance. It does not agree that that existing policy is a valid one, nor does it substitute the payee

for the insured, nor change the insurance from one upon the interest of the insured in the property to an original contract of insurance upon the interest of the payee.

The distinction between an interest in the insurance contract, which the payee acquires, and the interest in the property upon which the insurance is predicated must be manifest.

Smith vs. Saratoga Mut. Ins. Co., 3 Hill, 508.

The "interest of the trustee" contemplated by the mortgage clause has reference to his interest in the insurance, and not to his insurable interest in the property. This is clear not only on principle, but results as well from the express language of the mortgage clause. The clause reads: "This *insurance*, as to the interest of the mortgagee or trustee *therein* only, shall not be invalidated, etc."

The interest referred to, the right of the payee to receive payment of the insurance in case of loss, is an acquired or derivative right growing out of the contract with the original insured, and is not in itself an original contract of insurance.

Meriden Savings Bank vs. Home Mut. Ins. Co., 50 Conn., 396.

Davis vs. German-American Ins. Co., 135 Mass., 251.

Not only are we led to the conclusions thus reached from the authorities which have been presented, but we find that the mortgage clause occupies a distinct place in the history and development of the business of fire underwriting, and of the law governing the subject. That it is designed to meet a necessity of the business, for an understanding of

which we are required to go back to the early history of insurance law. By so doing we find the practical reason by which to account for the existence of this peculiar form of contract.

A mere glance at this sort of a contract, which may be called an anomaly to the law of contracts, suggests immediately the question, why does such a contract exist for the purpose of securing the benefit of fire insurance to mortgagees or the holders of collateral securities, when it is manifest that an insurance directly to the mortgagee upon his interest as such would be a simple and valid undertaking? In response to that question we say that the principle of indemnity, the wholesome principle which lies at the foundation of fire underwriting, has rendered it inevitable that this form of contract should exist, and that fire underwriters should in general furnish insurance for the benefit of collateral interests, only in the form of a secondary or derivative contract, resting primarily upon the interest of the owner of the property.

Throughout the whole history of fire underwritnig it has been a perplexing problem to restrict the amount of insurance recoverable upon the property to the actual value of the property. Over-insurances and double insurances are the source of the greatest evils and dangers known to the business of fire underwriting. It is through these means that losses by fire may be readily made the subject of speculation and gain and fraud. To restrict, therefore, by every possible means, the amount of the insurance carried upon property to the amount of its actual value has ever been the aim of underwriters, and in this they are sustained by a wise public policy.

Now, by an early decision of Lord Mansfield, the door was thrown open (unwittingly be it said, with respect to the memory of that learned man) to the perpetration of fraud by means of double insurances.

In the case of Godin et al. vs. London Assur. Corporation, 1 Burr, 489; 1 Bl. Rep., 103, Lord Mansfield decided that where different parties with different interests in the same property took out separate insurances, these insurances would not be contributory to each other, and each party might recover to the full value of the property within the limit of his insurance. This was a departure from the rules previously laid down, both in England and upon the Continent, whereby in the case of double insurances it was established that there should be but one satisfaction for the loss, to which the various underwriters in interest should contribute.

Under this decision of Lord Mansfield it became possible for any number of persons with different interests to insure property to its full value; as any lien might of itself exceed the whole value of the property, and thus many times the value of the property would be recovered in case of its destruction.

The decision of Lord Mansfield was followed in many cases, and is the law to-day. In fire insurance it came to be applied to cases involving the interests of mortgagor and mortgagee, and in many cases it has been held, and it is the law to-day, that insurance issued directly to a mortgagor and insurances issued directly to a mortgagee or to any number of mortgagees, are neither contributory to each other, nor does the one invalidate the other under the provisions of policies forbidding the taking of other insurance.

Among the cases upon this subject are:

Tyler vs. Aetna Ins. Co., 12 Wendell, 507.
Fox vs. Phoenix Ins. Co., 52 Me., 333.
Mut. Safety Ins. Co. vs. Hone, 2d Coms., 235.
See 2 May on Ins., section 365.

This line of decisions, adding manifestly to the insurance risk by increasing the opportunities for double insurances, and hence the moral hazard of the insurance, led underwriters by a general consent, to practically cease to insure mortgagee interests as such. The "loss payable clause" was accordingly introduced into fire underwriting, and became the common form of collateral security; so that insurances ran to the mortgagor or owner of the property with the clause, "Loss, if any, payable to John Doe, mortgagee, as his interest may appear."

As we have heretofore shown, this loss payable clause received great attention from the Courts, and it has been uniformly held that the insurance thereunder is an insurance of the mortgagor upon his interest in the property, the mortgagee being thereby made merely an appointee to receive such sum as might otherwise become payable to the mortgagor.

The purpose of this clause and the practice under it will be readily understood to be the restricting of the insurance to a single insurable interest, and thus to limit the recovery in case of loss, to a single indemnity, measured by the value of the property. When taken in connection with other clauses in the policy, such as that providing that the interest of the insured shall be the unconditional and sole ownership, it is designed that the amount of

insurance recoverable shall be restricted to an amount equal to the value of the interest of an owner of the entire property, and that no more than once the value of that interest should be recovered.

But, pursuing the subject further, the fact that the Courts uniformly held that this form of insurance would not protect the mortgagee against the subsequent acts of the mortgagor, in violation of the terms of the policy, led to a demand on the part of the holders of collateral interests for a more liberal contract in their favor. To this demand the underwriters cautiously yielded. But the present mortgage clause did not spring at once, full fledged, into existence. It is apparently the result of successive additions to the ordinary loss payable clause.

Thus in the case of City Five Cents Savings Bank vs. Pennsylvania Fire Ins. Co., 122 Mass., 165, the loss being payable to the mortgagee, the policy contained the special provision merely, that "No sale or transfer of the property hereby insured shall vitiate the right of the mortgagee to recover in case of loss," and there are other cases of endorsement which do not contain all of the features of the Union Mortgage Clause.

But what is specially to be observed in this connection is, that while yielding to the demands of mortgagees for a more liberal form of endorsement, the underwriters did not abolish the loss payable clause, nor return to the plan of issuing insurances directly to mortgagees upon their interests as such, as might have been done had the underwriters been willing to sacrifice the principles of indemnity or to assume the additional risks attendant upon the prac-

tice of separately insuring diverse interests in the same property.

Such being, in brief, the history of this form of agreement and the reason which underlies it, it can be readily seen why from the standpoint of practical underwriting the form of insurance now under consideration must be treated as primarily and essentially an insurance of the interest of the owner of the property and not an insurance of the interest of the mortgagee as such. Any other theory is subversive of fundamental principles of underwriting, and destructive entirely of the protection intended to be maintained against unlimited insurances upon limited values.

The opinion of the Court of Appeals upon this branch of the case is to be found on page 175 of the transcript.

II.

The Mortgage Clause in suit did not provide that the insurance, as to the interest of the Trust Company, should not be invalidated by acts of the mortgagor, or owner.

There is another reason why *The International Trust Company* cannot recover under this mortgage clause, by virtue merely of its interest in the securities. This reason grows out of peculiar provisions of the mortgage clause before us. A contract of this kind is a special bargain to be construed according to its terms and not to be enlarged by implication or extrinsic facts. In one important and remarkable aspect this mortgage clause differs from the ordinary standard mortgage clause, and from that found in the Bohn case. In the present instance, the form of security used is a trust deed and not a mortgage. The trustee under the trust deed is one Mahlon D. Thatcher. But the mortgage clause, instead of making the loss payable to Mahlon D. Thatcher, the Trustee, *makes it payable to The International Trust Company.*

Now, the recitals at the beginning of the mortgage clause go to distinguish it from similar clauses which have been before the Courts. The language used is as follows: "Whereas, The property described in this policy has been conveyed to Mahlon D. Thatcher, in trust, to secure the payment of a certain indebtedness to The International Trust Company, of Denver, Colorado;

"And whereas, The owner of the policy has requested that the loss, if any, be made payable *to the*

said company; therefore, the loss, if any, is made pay- Colorado, and its assigns." But the instrument then goes on in the ordinary language of the mortgage clause, and provides that "This insurance, as to the interest of the mortgagee, *or trustee, only,* therein, shall not be invalidated by any act or neglect of the clause does not make reference to the interest of the mortgagor or owner of the property insured." The Trust Company, nor provide that the insurance shall not be invalidated as to the interest of The International Trust Company by the act of the mortgagor. So that, even assuming that the protection of the ordinary mortgage clause may be extended to apply to a case where the person insured has no interest in the property, it cannot be said that under the language of this clause The International Trust Company can avail itself of that protection.

If the interest *of the trustee only* in the insurance is not to be invalidated by acts of the owner of the property, then the interest of The International Trust Company is not included in the terms of this contract. Whatever the party who drew this instrument may have intended to accomplish, it is certain that it falls short of containing an exemption of The International Trust Company from the acts or neglect of Gordon. To make such a meaning evident, would require language which the parties have not used, and to enable the Court to give such a construction to the contract would require a reformation of the instrument, which is not called for in this action. If the Trust Company desired to secure enlarged and special benefits to itself, to be carved out of this insurance, it should have bargained for and secured a contract in language adequate to express its de-

sires and intentions in this behalf. If it has failed to do so, it is not the duty of the Court to make over the contract, or to reform the language used, particularly when no request has been made to that end. As the contract reads, it is in reality to be construed as to The International Trust Company as the ordinary loss payable clause has always been construed, and as if no provision of exemption in any event existed.

The two words, "mortgagee" and "trustee," used in this clause, are evidently incorporated into it, following the well known formula of the Union mortgage clause, which is printed and distributed by underwriters for use over a large territory, covering different States in which a variety of forms of real estate security are used—in some States mortgages, and in others trust deeds—the form being prepared with reference to use in a variety of cases, the one word, "mortgagee," or the other, "trustee," being superfluous according to whether a trust deed is used or a mortgage.

In case of a trust deed, it will be apparent that the interest of the *cestui que trust* and that of the trustee—in other words, in this case, the interest of The International Trust Company and that of Mahlon D. Thatcher, afford very different subjects matter for insurance.

In a case of this kind, where interests in property subject to trust deed are involved, there are three distinct insurable interests, upon any one of which, as a basic interest, the insurance might be predicated by a proper understanding and agreement of the parties and designation of the interest to be covered. Very different legal and practical

results would flow and different relations would be created between the several parties, according to the interest insured. Thus, the insurance could be written upon the interest of the owner of the property, or it could be written directly to the Trustee, or, again, directly to the *cestui que trust.* Again, it might be issued to the owner of the property with loss payable to the Trustee; or, with loss payable to the *cestui que trust.* The consequences of making the loss payable to the Trustee differ materially from those where it is made payable to the *cestui que trust,* the owner or holder of the note or notes which the trust deed is given to secure. Thus, if the loss be made payable to the Trustee, he holds the money, in case of loss, for all parties—both the owner of the property and the owner of the note—or notes, if there be more than one—whoever the owners of the notes may be, and whatever transfers may have been made of the securities.

If the owner of the property be not in default upon the note, the Trustee cannot pay over the funds in his hands to the owner of the note, but must hold the money as trustee for all parties and be accountable therefor to all.

Fergus vs. Wilmarth, 117 Ill., 542.

In case there should be no liability to the insured, the owner of the property, by reason of the breach of the policy conditions, it would seem that the Trustee would by virtue of the subrogation clause of the mortgage clause be trustee for the insurer and the owner of the note.

Frequently the payment of the insurance money to a Trustee will be undesirable to the note holder, as for instance, in the case of a Public Trustee. The

coming into possession of the insurance money immediately without the intervention of the Trustee, would be a desirable thing in many instances to the owner of the note, and it may be surmised that it was for such reason that The International Trust Company would desire the loss paid directly to it. But different legal consequences necessarily result in the two cases. And it cannot be contended that the Trust Company and Thatcher, the Trustee, occupy identical relations. The exemption of Thatcher, the Trustee, is not necessarily an exemption of the Trust Company from the acts of the party insured. The International Trust Company is not the Trustee under this contract, and the Trustee is alone declared to be exempt from the acts of the assured.

As to his interest in the property, the Trustee is the trustee of the legal title. Insurance, if it were made directly to him, would attach by virtue of his legal title to the property and his trust relations thereto. But where a particular owner of a note is designated as the payee, not in general terms, but by expressly naming the party, as in this case, The International Trust Company, the sale or transfer of the note, *without recourse*, terminates absolutely the interest of the payee in the insurance. And the insurance does not stand for the benefit of the endorsee of the note as it would in case the loss were payable to the Trustee. Thus it follows that as an insurance of the Trustee and an insurance of the *cestui que trust*, or particular owner of the note, are very different and distinct undertakings, a clause in the contract which speaks of the interest of the Trustee only cannot be

extended by implication merely, to the interest of the holder of the note.

In the Bohn case the loss was made payable to The National Life Insurance Company, beneficiaries and assigns, and the clause went on consistently with this direction throughout, to provide that as to the interest of the "mortgagee, beneficiaries and assignees," the insurance should not be invalidated, etc.

III.

The Trust Company itself did not have such an Insurable Interest in the securities as would support the insurance.

It is contended as above on behalf of the petitioner that the basis for the insurance contemplated in the alleged contract is the interest of John R. Gordon, as owner of the property, and that interest having no existence in fact, the alleged contract, had it been issued at all, would have been void for breach of warranty as to ownership.

But we proceed now to consider the case upon the theory adopted by the Court of Appeals, viz.: That the contract is one directly with The International Trust Company, and an immediate insurance of their interest as such in the property. Here comes in for consideration the second special defense presented by the appellee, viz.: That on December 29th, 1893, the Trust Company sold without recourse the Gordon note to The Investor's Mortgage Security Company, of Edinburgh, and that on August 26th, 1893, the complainant Trust Company was not the owner of the Gordon note; that it did not have the insurable interest therein sufficient to sustain the

insurance under the terms and requirements prescribed by the policy of defendant society as to interest and ownership of the subject of insurance. So that, even if the insurance contemplated by this contract was an insurance of the interest as such of The International Trust Company, in the property, no recovery could be had, because the Trust Company did not have the interest requisite to support the insurance according to its terms and conditions.

The defendant in error, the plaintiff below, claims that at the time the policy was issued, The International Trust Company was the absolute owner of the Gordon note by a repurchase made on the 12th day of June, 1893, and as such owner had the insurable interest required by the terms of the insurance contract at the time that contract is alleged to have been made, and that the insurance attached directly upon that interest. The Court of Appeals sustained this contention.

But the claim of the Trust Company to the ownership of the Gordon note is based wholly upon corpany and the Investor's Company relative to the collection and to the repurchase by the Trust Company of the note. That correspondence is read into the evidence in the case by the witness, Hobson, beginning on page 33 of the transcript and continuing through page 43.

It is contended on behalf of the petitioner that this correspondence resulted, at most, in an engagement on the part of the Trust Company to take over the securities on the 15th of September. The Court of Appeals interpreted this correspondence as constituting a repurchase of the note on the 12th of June. The correspondence must be examined to de-

termine whether the contention of petitioner is correct as to the effect of that correspondence, and as to whether or not it consummated a purchase of this note prior to the 6th day of July, 1893.

This branch of the case involves a consideration of the purpose and effect of the mortgage clause in another aspect entirely from that presented in the foregoing discussion. If the contention of the defendant in error, The Trust Company, should be sustained that the mortgage clause constitutes a direct and original contract of insurance of the Trust Company upon its specific interest in the property, the further question is presented as to whether the interest which the Trust Company actually had in the Gordon indebtedness at the time the insurance was issued, was such an interest as would support the contract of insurance upon which recovery is sought.

It is claimed by the petitioner that the Trust Company did not have such an interest. Herein are presented questions as to the meaning and effect of the mortgage clause which we submit are likewise of such importance and general interest as to merit an examination and review by this Court.

The majority of the Court of Appeals held that that Court was concluded in this case from a consideration of the question here presented, viz.: Whether the correspondence referred to constituted and effected a repurchase of the Gordon note by the Trust Company; because the trial court made a finding that "The Trust Company did on the 12th day of June, 1893, reacquire title to the note of said John H. Gordon by repurchase, and did reacquire an insurable interest in and to the property covered by the policy of insurance issued by the defendant company;

and the Trust Company did on the 12th day of June, 1893, actually pay to the said Investor's Security Company the sum of $1,750.00, being part of the amount due upon repurchase; and did assume the payment of the balance of the purchase price, viz.: $50,000, and did from that time on treat and dispose of said note as its own property."

Sanborn, J., dissented from this view of the majority of the Court, being of the opinion that the Appellate Court was not, under the manner and form in which the question was presented, precluded from examining this correspondence which contained the evidence relating to the insurable interest of the Trust Company and of its alleged repurchase of the note. This question we have reserved for consideration in a subsequent part of this brief, believing that of itself the question thus involved is of sufficient importance to claim the attention of this Court.

The Court will acquire a better understanding of the propositions involved under that branch of the case after some consideration of the part of the case now under review.

The majority of the Court, however, in passing upon this question, said: "But even if the special finding now under consideration was open to review by this Court, we should not be able to say that the Circuit Court erred in finding that the Trust Company had such an insurable interest as was sufficient to support the policies. In the case of The International Trust Company vs. The Norwich Union Fire Insurance Society, we have held, that the Trust Company had *an insurable interest* on June 26, 1893, by virtue of the consummated agreement with The Investor's Mortgage Security Company to take up the

Gordon note, which was secured by deed of trust on the insured property. It was further shown in these cases, that on June 12, 1893, the Trust Company had advanced and paid the interest on said note, amounting to $1,750, and we think it most probable in view of the relations then existing between the Trust Company and the Mortgage Company, that the payment so made gave to the former company such an interest in the note and deed of trust as would serve to support a policy covering the mortgaged property which was taken out after that date."

In directing the consideration of the Court to the correspondence in question, it is to be noted that in another case, that of The International Trust Company, Appellant, vs. The Norwich Union Fire Insurance Society, Appellee, a suit in equity heretofore presented to this Court upon petition for writ of certiorari, the correspondence produced in evidence, varied from that introduced in the present case. In the present case we have a cablegram of June 26, 1893, from the Investor's Company to the Trust Company; a letter of the same date from the Trust Company to the Investor's Company; and a letter of June 28th from the Investor's Company to the Trust Company, which were not introduced in the equity case referred to. We accordingly would refer to the correspondence as shown by this record, pages 33 to page 43, inclusive, as set out fully in the petition for this writ.

We submit that, under the terms and provisions of the insurance contract, The International Trust Company did not on July 6, 1893, have the insurable interest of the nature and extent required and neces-

sary to support the insurance claimed by it to have existed in its favor.

Herein is involved, as stated in our petition, the question of the nature and extent of the insurable interest acquired under an uncompleted agreement or negotiation for the purchase of collateral securities, and the extent to which an inchoate interest in a promissory note or chose in action, the nature of which interest is undisclosed and unknown to the insurer, will support an insurance which requires that the interest of the insured shall be a sole and unconditional ownership. These questions involve the consideration of the contractual relations created by the policy of insurance with mortgage clause attached, and are of importance not in this case alone, but in all cases involving the construction of contracts of this kind.

In regard to the ownership of the Gordon note and its repurchase by the Trust Company, the Court of Appeals says in its opinion: "Now, while it may be true that the legal title to the paper was not vested in the Trust Company on June 26th, 1893, or even on August 26th, 1893, in the sense of the law merchant or in such way as to cut off equities of defense, because it had not been endorsed by the Mortgage Company, nevertheless, as *the agreement of sale was complete* and *the note was in the hands of the Trust Company*, there can be no doubt that the Trust Company had a good equitable title to the paper on August 26th, 1893, such a title as would have enabled the Trust Company to maintain an action at law on the note in the Courts of Colorado, whose code provides that

'every action shall be prescribed in the name of the real party in interest.'"

Code of Procedure, chapter 1, section 3.

"A consummated agreement of sale such as is shown by the correspondence in the present case, especially where the thing sold *is in the possession of the vendee*, operates to transfer the title of the article or thing sold to the purchaser. Under these circumstances we have no doubt that the Trust Company had *an insurable interest* in the hotel property in controversy on August 26th, 1893, and the contention to the contrary is in our opinion without merit."

Now, it will be observed that the Court of Appeals proceeds upon an assumption: First, that the agreement of sale was complete; and second, that the note was in the hands of the Trust Company or "in the possession of the vendee;" and third, that "*an insurable interest* in the hotel property" was all that was necessary to support the insurance in question. But in the first place it will be disclosed by the correspondence itself between the Trust Company and the Investor's Company, that the terms of the sale were not agreed upon until September 5th, 1893. (See letter of International Trust Company to Guild & Shepherd of that date). Again, the note was *not* in the possession of the Trust Company, the note was endorsed by the Investor's Company to "John F. Bell, Trustee, for Investor's Mortgage Security Company, Limited." And as shown by letter of August 9th, 1893, it was sent by the Investor's Company to John F. Bell, so endorsed to him as Trustee, with the instruction, "Kindly acknowledge receipt of same and hold it for collection."

Finally, if it be admitted that under these cir-

cumstances the Trust Company had "an insurable interest in the hotel property in controversy on July 6, 1893," it will be observed that the petitioner in this case has not undertaken to controvert or discuss the proposition as to whether an insurable interest existed, as it has been deemed unnecessary to do so in view of the fact that *an insurable interest*, merely, would not, in any event, have been sufficient to sustain an insurance such as that claimed to have existed in this case. It was necessary, in order to support such a contract of insurance, not only that the party insured should have had "an insurable interest," but that the interest of the kind and extent expressly called for by the terms of the contract should have existed.

Upon this correspondence the question is raised as to whether in contemplation of law The International Trust Company was the owner of the Gordon note on the 6th of July, 1893, or whether, by virtue of this correspondence, the Trust Company acquired the insurable interest necessary to support, under the terms of the contract, an insurance directly upon the interest of The International Trust Company. This, in turn, involves the more general consideration of importance in connection with the interpretation and construction of the mortgage clause generally, as to how far the terms and conditions of the policy itself enter into or control the mortgage clause, or to what extent the terms and conditions of these two instruments enter into each other and how the two instruments are to be construed when taken together in order to define the obligation assumed thereunder by the insurance company. What, in other words, are the terms and

conditions of the insurance as between the underwriter and the payee, with respect to the various matters upon which the mortgage clause is silent, but with respect to which the policy itself speaks? If this is an insurance directly to the Trust Company upon its interest in the property, what are the terms and conditions of that insurance?

In considering the legal effect of the correspondence in question upon the ownership of the Gordon note, it becomes necessary to consider at the threshold the question which naturally and of necessity arises in the consideration of all such contracts, viz.: What constitutes the agreement between the insurer and the payee under the mortgage clause, as to the terms and conditions upon which the insurance is predicated; and how far are the terms and conditions set out in the policy to be taken as incorporated into the agreement with the payee under the mortgage clause; and how far do they go to determine and define the contractual rights of the parties, for example, as to the nature and extent of the insurable interest required of a payee?

Our position here is, that the terms of the policy must be referred to in order to determine the rights of the parties to the mortgage clause; so that, where the policy provides that if the interest of the insured in the property be not truly stated that the policy shall be void, and that it shall be void if the interest of the insured be other than unconditional and sole ownership, those conditions are to be applied and enforced with respect to any interest which is the subject of the insurance. In other words, the mortgage clause must be subject to the conditions of the policy with regard to the nature and

extent of the insurable interest required to support the insurance.

In the case of American Building and Loan Association vs. Farmers' Insurance Company, 40 Pacific, 125-127, the Supreme Court of Washington says upon this subject: "The annexation of the mortgage clause operates merely as a modification of the policy by dispensing with certain requirements, duties and obligations which by the terms of the policy were imposed upon the owner, and protects the mortgagee against his (the mortgagor's) acts, either of omission or commission; but that general provisions of the policy intended for the security and protection of the company, and which do not relate personally to the mortgagor, such as the stipulation concerning the time in which an action shall be brought are not abrogated or affected by it. The mortgage clause is not a complete contract in itself, nor does it profess to be. It is of course conclusive upon the parties in so far as it speaks, and controls any provisions of the policy to which it is attached which are inconsistent with it; but as a complete or entire contract it is indefinite and uncertain. Resort must still be had to the terms of the policy to ascertain many things which are the very life of the contract; among others, the amount of the insurance, the property insured, the term of insurance, and very many matters concerning which the endorsement itself furnishes absolutely no information whatever. The suit is based not upon the endorsement as a complete contract, but upon the policy of which it is simply a part. It is the policy which constitutes the basis of plaintiff's right to a recovery."

And so, in the case of Ormsby vs. Phoenix Insurance Co., Supreme Court of South Dakota, 24 Ins. L. J., 115, the court says: "But notwithstanding the mortgage clause constitutes a new agreement between defendant and mortgagee, there is, nevertheless, incorporated into it certain portions of the original contract of insurance with the owner or mortgagor. The property insured, the amount insured, the terms of the policy, the rate of insurance, must be determined by the original policy. In addition thereto the stipulations contained in the original policy may under certain circumstances be in force and effect."

In the case at bar, moreover, the mortgage clause expressly and formally declares that its "foregoing provisions are made a part of the policy * * * to which they are attached." And the policy also provides that its conditions shall apply to other interests than that of the insured, in the manner expressed in the provisions relating to such interest as may be attached to the policy. To determine, therefore, the nature and extent of the interest required to support a contract immediately with The International Trust Company, it is necessary to resort to all of the terms of the insurance bearing upon that subject.

The interest upon which an insurance immediately to the plaintiff below would have to be predicated would be the interest of the plaintiff in the indebtedness, or its interest in the property by reason of, and measured by, its interest in the indebtedness; that is, in the Gordon note and securities.

Carpenter vs. Providence Wash. Ins. Co., 16 Peters, 495.

This would be, perhaps, not strictly an insurance of the debt, but an insurance of the plaintiff against any impairment of the value of the debt, by loss of the property which constitutes the security for the debt; so that the interest, if any, of the Trust Company in the debt or note, constitutes its insurable interest. The interest is described "as a certain indebtedness to The International Trust Company."

The mortgage clause in this case does not run as in some cases, "as interest may appear," but specifies the interest. We would submit, therefore, that the interest of the Trust Company, in order to support an insurance directly to it, must have been the sole and unconditional ownership of the Gordon note, or indebtedness, and that this interest must have existed at the time the insurance is alleged to have been taken out. The requirements as to interest constitute warranties as to the nature and extent of the interest insured.

By endorsing the note without recourse, The International Trust Company ceased to have any responsibility or liability as endorser, and therefore parted with all of its interest when it sold the note to The Investors' Security Company, December 29th, 1892. So that unless the correspondence between the Trust Company and the Investors' Company vested in the Trust Company the sole and unconditional ownership of the Gordon note on or before the 6th day of July, 1893, the insurance, even as an insurance directly upon the interest of the Trust Company, failed.

We think the appellant admits this, and accordingly it insists that it was the absolute owner of the note.

In Carpenter vs. Providence Washington Insurance Company, 16 Peters, 495, this Court says:

"The authorities all hold that the party insured must have an interest at the time of the making of the policy as well as at the time of the loss; and if Reed had no interest upon which the policy would attach by its terms when the insurance was made, but acquired it afterwards, and the policy had been made upon his sole account, it would have been a mere nullity."

In Bergson vs. Builders' Insurance Company, 38 Cala., 543, the Court says: "The insured must have an interest in the property, both at the time the contract is made and when the loss happens; otherwise there can be no recovery on the policy; and upon this point all the authorities agree."

In Saddlers Company vs. Badcock, 2d Atkyns, (1st Bennett's Fire Insurance Cases, 7-9), the Court says: "I am of the opinion it is necessary that the party insured should have an interest or property at the time of the insuring, and at the time the fire happens."

So, in Howard vs. Albany Insurance Company, 3d Denio, 301, the Court says: "When the assured has no interest at the time the contract is made the fire policies the assured must have an interest at the time of the loss, as well as when the contract is made."

To the same effect are the following authorities:

Phoenix Ins. Co. vs. Benton, 87 Ind., 132-133.

Fowler vs. New York Indemnity Ins. Co., 26 N. Y., 422.

Aurora Fire Ins. Co. vs. Johnson, 46 Ind., 315-322.

Chrisman vs. State Ins. Co., 16 Ore., 288.
Commercial Fire Ins. Co. vs. Capitol City Ins. Co., 81 Ala., 321.
Dickerman vs. Ins. Co. (Vermont), 30 Atlantic, 808.
Henning vs. Western Assur. Co., 77 Ia., 319.
Waller vs. Northern Assur. Co., 64 Ia., 101.

But it is not only necessary that the assured should have an insurable interest, but he must have the insurable interest which the contract calls for. In other words, he must, as in this case, have at the time of the making of the contract, the unconditional and sole ownership.

"It is not sufficient even that the party have an insurable interest in the property. He must have such an interest as the contract specifies."

Tallmann vs. Atlantic Ins. Co., 29 Howard's Practice, 71-86.

A consideration of what may in general constitute an insurable interest is not of importance, where the policy defines the extent of the interest necessary; as a mere insurable interest is not sufficient, if it falls short of the actual requirements of the policy.

Thus in Wineland vs. Security Ins. Co., 53 Md., 276, the Court says: "The question before is us not whether the appellant had an insurable interest in the buildings insured, but whether by the terms of the contract into which he entered he had that kind of an interest, to-wit: title in fee to the land on which the houses stood, which the policy stipulates he shall have.

"Acceptance of the policy with condition as to

absolute ownership amounts to a declaration that the interest is absolute."

Mers vs. Franklin Ins. Co., 68 Mo., 127.

Hinman vs. Hartford Fire. Ins. Co., 36 Wis., 159.

Fitchburg Savings Bank vs. Amazon Ins. Co., 125 Mass., 431.

Miller vs. Amazon Ins. Co., 46 Mich., 463.

"If the policy be once void it will not be revived by the fact that the assured subsequently acquires an interest."

Imperial Fire Ins. Co. vs. Coos County, U. S. Supreme Court, 1894, and cases there cited.

Carpenter vs. Providence-Washington Ins. Co., *supra.*

Cockerill vs. Cincinnati Mut. Ins. Co., 16 O., 148-165.

Peabody vs. Washington County Mut. Ins. Co., 20 Barb., 339-341.

The interest must be truly stated. Thus, where the insured was in possession of the property, having paid $2,680 of the purchase price, title to pass when balance of purchase price should have been paid. Held, that her interest was not truly stated, although it was true she had an insurable interest.

Lasher vs. St. Joseph, etc., Ins. Co., 86 N. Y., 423.

Ins. Co. vs. Bronger, 6 Bush. (Ky.) 146.

The Requisite Interest May be Measured by Other Considerations

Thus the agreement in the mortgage clause for subrogation and assignment of the securities by the

party to whom payment may be made, contemplates such an interest therein as would enable the Trust Company to make a complete assignment. This of itself would seem to involve of necessity the unconditional and sole ownership.

The subrogation clause is one which must be enforced. It is a material and important part of the contract to the terms of which the Courts give full effect.

Foster vs. Van Reed, 70 N. Y., 19.
Thornton vs. Enterprise Ins. Co., 71 Pa. State, 234-6.

By agreeing to make an assignment of the securities, the Trust Company warranted that it had the power to make such assignment.

Dick vs. Franklin Ins. Co., 10 Mo. Appeals, 376.
Affirmed in 81 Mo., 103-8.

But under the conditions existing on the 6th day of July, 1893, at which time the validity of the insurance is to be determined, the plaintiff could neither have assigned nor transferred the Gordon note, nor could it have compelled the Investor's Company to assign it. The inability of the Trust Company to make an assignment of the note at the time it claims to have made a contract of insurance with the appellee, shows the insufficiency of its insurable interest to meet the requirements of the agreement. If the Trust Company was the unconditional and sole owner of the note, it could transfer it. The provision for subrogation clearly contemplates that the hands of the party to whom payment is contemplated should not be tied in such event.

Where a party agrees to transfer an interest in

lands for a certain term of years, and at the time of agreement he has not that interest, there is no contract. The plaintiff must have an interest which will enable him to perform his contract.

Routledge vs. Grant, 4 Bing., 653.

1 Langdell's Cases, 5-10.

And if the party were unable to make such an assignment, his right to recover would be defeated.

Davis vs. Quincy Ins. Co., 10 Allen, 113-117.

If the mortgagee had entered into a contract inconsistent with the right to assign the mortgage debt as was provided, it would be a valid bar to any recovery upon the policy.

Foster vs Van Reed, *supra.*

Where a policy has an express provision for subrogation, the assured cannot recover if he has made a contract with a railroad company whereby his power to make a subrogation is annulled.

Inman vs. South Car. R. R. Co., 129 U. S., 128.

Carstairs vs. Mechanics' & Traders' Ins. Co., 18 Fed., 473.

Niagara Ins. Co. vs. Fidelity, etc., Co. (Pennsylvania S. C.), 18 Ins. L. J., 301.

Again, the interest in the debt must be free from the claims and interests of other parties. But undoubtedly on the 6th of July, 1893, the actual ownership of the Gordon note was vested in the Investor's Company.

Two different parties, while they may have each an insurable interest, cannot have the same insurable interest at the same time in the same property. The relative interests of the Trust Company and the Investor's Company in this note at that time, and the

fact that the Investor's Company were the real owners of the Gordon note, will come to light if we suppose the loss to have been made payable to Mahlon D. Thatcher, Trustee, under the policy, and that both the Trust Company and the Investor's Company had made claim to the benefit of the insurance. And supposing that one or the other, or both, were at the time insolvent, it would seem evident that the proceeds of any insurance money which might be paid to the Trustee, would belong to the creditors of the Investor's Company, and not of the Trust Company.

The general significance of the question thus presented will be appreciated when such a predicament is contemplated.

If now, the Investor's Company was possessed of the insurable interest requisite to support an insurance contract identical with that which is claimed by the Trust Company to exist in its favor, it follows that the Trust Company was not possessed of that requisite interest.

As a further test of the interest of the Investor's Company, it may be asked, in what way the Investors' Company was obligated to transfer the note to The International Trust Company? If not so obligated, the Trust Company had not acquired the right to say that these securities had been repurchased by it. Neither would the Trust Company be compelled to take over the securities under the then existing conditions. The consideration, if any, must be one of mutual promises. If such do not exist, there is no contract.

Chicago & G. E. R. R. Co. vs. Dane, 43 N. Y., 241.

Neither party is bound unless both are bound.

Langdell's Summary of the Law of Contracts, Sec. 10.

Even a "moral obligation" to relieve the Investor's Company of the note would be no consideration for a promise to buy the note. The notion of a moral consideration has had no countenance since the case of Eastwood vs. Kenyon.

Langdell's Cases, 343 (Summary), pages 1025-6.

The entire transaction upon which the claim to a repurchase of the note is based having been carried on by correspondence, the effect of that correspondence and whether or not it showed a repurchase of the note prior to July 5, 1893, presents a question of law; and the mere circumstance that the trial court incorporated the legal conclusion here called for into its findings of fact does not preclude an Appellate Court from inquiring into the legal effect of the correspondence, and reviewing as a matter of law what the trial court has erroneously termed a *"finding of fact."*

Letters and other writings upon the contents of which a contract is claimed to exist are construed by the Courts as matters of law.

Arnold vs. Bailey, 24 S. C., 494; 3 Am. and Eng. Enc. of Law, 867.

Dwight vs. Germania Life Ins. Co., 103 N. Y., 342.

Hamilton vs. L. & L. & G. Ins. Co., 136 U. S., 242.

Barton vs. Grey, 57 Mich., 623.

The correspondence, when summarized so far as relates to the matters under review, shows that

shortly before the note matured, Cuyler, Morgan & Co., the New York correspondents of The Scottish Investor's Company, transmitted the Gordon note to the plaintiff below *for collection.* (Record, page 33.)

Having found that Gordon could not pay the note, the plaintiff, on June 12th, remitted the accrued interest, $1,750, to Cuyler, Morgan & Co. (this interest being paid to the Trust Company by Gordon on June 19th, thereafter—record, page 66), and informed Cuyler, Morgan & Co. that as the plaintiff, the Trust Company, was authorized to reinvest the money, they had arranged to extend the loan six months (page 34).

Plaintiff also on June 12th cabled the Scottish Company to the same effect as it had written Cuyler, Morgan & Co., and added: "Can take loan ourselves soon, *if desired.* Await our letter of this date." The letter referred to of that date said: "We will, just as soon as possible, take up the Gordon loan ourselves, *if you desire it,* and remit the money to Cuyler, Morgan & Co. to your credit. Please wire us what your wishes are, and we will arrange to conform to them."

In a letter of the following day (June 13th), in answer to advices received that day from the Scottish Company under date of May 31st, to the effect that on repayment of the Gordon loan they would require the money, the Secretary of the plaintiff company further wrote: "The best I can do under the circumstances is to say that we will ourselves, *just as soon as possible, if you desire it,* take up the loan and carry it ourselves. We would do so immediately, but for the fact that times have been very hard here and we have been compelled to renew loans, etc.

* * * You need not have any anxiety about this loan or security, for *whilst we do not legally guarantee any loan*, we always stand back of our correspondents and protect them, and at any time we would rather take up a loan than to have them dissatisfied. To be perfectly frank, it would be quite an inconvenience to us to take up this loan at present, as we need all of our money, and if entirely agreeable to you we would like to have the privilege of taking it up at any time within sixty days from its maturity."

The Scotch Company, on June 14th, merely acknowledged receipt of plaintiff's cablegram of the 12th, and said: "We accordingly wait your letter." But on June 26th, in answer to the letter which was received that day, cabled: "Have received your letter 13th of June. *We will delay until 15th of September.*" This cablegram was confirmed by letter of June 28th (received July 15th), which, after expressing regret that their commitments would necessitate asking repayment of the loan, said (page 39): "Our Directors ask us to thank you for your kind offer to relieve them of this loan. They do not desire to inconvenience you by asking you to relive them of it at the present time, but they would like that you should make such arrangements as would enable you to take it over from us at a date not later than the 15th of September next."

The plaintiff replied to the above cablegram of the Scotch Company, which was received on June 26th, as follows (page 38): "This is satisfactory to us, and we will arrange to take up the loan at that time. We would do so now, but, as we wrote you, it would be quite an inconvenience for us, in view of the hard times."

There was no answer made to the letter of June 28th, which was not received until July 15th; and no further correspondence passed until July 21st, when the plaintiffs wrote the Scotch Company, enclosing the note and asking that it be endorsed to John F. Bell, Trustee, saying: "We will hold the same, and be responsible for it," etc.

The receiving of the note by the Scotch Company was acknowledged by a letter of August 5th, and on August 9th the note was endorsed by the Scotch Company to "John F. Bell, Trustee, for Investor's Mortgage Security Company, Limited," and was transmitted with a letter saying (page 40): "The Directors, at their meeting to-day, authorized the endorsation of this note to you as Trustee, and we now send same herewith so endorsed. Kindly acknowledge receipt of same *and hold it for collection.* We trust that it will not put your company to any great inconvenience to make payment of the same on the 15th of next month."

It seems that by a letter of August 21st, from the Scotch Company, which letter was not produced by the plaintiffs, but is referred to in a letter of September 5th (page 41), the Scotch Company proposed to extend the Gordon loan for one year from September 15th, at nine per cent. interest, the plaintiff to give its obligation for the same, and placing in the hands of bankers in New York, as security, the Gordon note, with some additional collateral. To this the Trust Company assented. On September 23d, under an arrangement as to further collateral, made on September 10th (page 42), with Mr. Guild, one of the Secretaries of the Scotch Company, who was in Denver at that time, the plaintiff com-

pany made a remittance to Cuyler, Morgan & Co. of $10,000 upon account, with the accrued interest on the note to September 12th, together with the plaintiff's own note for $40,000 and the Gordon note itself as collateral security, with other collateral, amounting, in all, to $61,000. The $40,000 note of the plaintiff was finally paid in January, 1894, some months after the fire, which, it is presumed, released the collateral securities held by the Scotch Company, including the Gordon note.

No entry was made upon the books of The International Trust Company indicating a repurchase of the Gordon note, until the latter part of September, 1893 (page 68).

But so much of the correspondence as may be necessary for our consideration may be comprised in a still narrower compass than that we have set out.

All correspondence prior to July 6th between the Investor's Company and The International Trust Company ended in the cablegram of June 26th from The Investor's Company and the letter in answer thereto of The International Trust Company of the same date.

If there was a purchase prior to the 6th of July, it must have been effected by this cablegram and letter. The letter of The Investors Company of June 28th added nothing to the transaction save to elaborate the cablegram of the 26th. If it constituted a new offer, it did not take effect as such until its receipt, which was not until July 15th, and, therefore, need not be considered; and if it did constitute a new offer, then there was no acceptance of it, because there was no reply made to it. As an elaboration of the cablegram, it may be of use merely to ex-

plain what might otherwise be obscure in the cablegram itself, as a similar use may be made of the subsequent correspondence.

We inquire, therefore, what, in purport and legal effect, was this cablegram saying, "We will delay until 15th of September"? In terms, this can be called neither a proposal nor an aceptance.

The Investor's Company thereby declared, in effect, that they would hold the matter in abeyance until the 15th of September. This was not an indulgence or forbearance of any legal obligation of The International Trust Company, for there was no such obligation existing; it was a forbearance simply in the sense that the Investor's Company proposed not, for the time being, to pursue or enforce the collection of the note, nor to insist upon the Trust Company then and there becoming the purchaser of the note, being in the hope, as expressed in the letter of June 28th, that the Trust Company should make such arrangements as would enable them to take over the note at a date, not later than the 15th of September.

Prior to this cablegram The International Trust Company had been urging an extension of the note, even going so far as to declare to the Investor's Company that which the record discloses was not true, viz.: That they had, in reliance upon a supposed authority to reinvest, given an extension of six months! To the appeal for an extension, the Trust Company had added: "We will ourselves, just as soon as possible, *if you desire it*, take up the loan and carry it ourselves," and, "if entirely agreeable to you we would like to have the privilege of taking it up * * * at any time before August 12th."

This was before the Investor's Company said anything at all about disposing of the note to the Trust Company.

To this appeal the Investor's Company replied: "We will delay until 15th of September." And to this the Trust Company replied: "This is satisfactory to us, and we will arrange to take up the loan at that time."

If there was a repurchase, or any contract whatever between these parties prior to the 6th of July, we think it must have been contained in this cablegram and reply. But if the letter of The International Trust Company, asking the privilege of taking up the note at any time before August 12th, can be construed as a legal proposition to buy the note, then that proposal was not accepted, for the Investor's Company simply replied thereto: "We will delay until 15th September."

If this cablegram of the Investor's Company constituted either an acceptance or an offer, it must have been the latter, because it varied in its terms from anything which had been proposed by the Trust Company. An acceptance, not according to the terms of the offer, is a rejection of the offer and in effect a new offer.

First Natl. Bank vs. Hall, 101 U. S., 43-50.
Carl vs. Duval, 14 Peters, 75, and cases there cited.

It would seem that, under such circumstances, the Investor's Company would remain the owner of the note until September 15th. No terms of purchase are proposed or contemplated in this correspondence, and it is not until late in August that the parties take up a consideration of terms of pur-

chase, and in September reach an agreement upon such terms. We do not see how this correspondence, therefore, can be regarded as in any sense a purchase of the note prior to July 6th, 1893, or that the title of the note or the ownership thereof changed until the contract of repurchase was completed. Nor does it appear that by virtue of this correspondence the Trust Company had acquired at the time this policy was issued, such an insurable interest by contract as would be necessary to support the insurance contract sued upon.

"In order to make a contract there must be a proposal and an acceptance. In order to convert a proposal into a promise, the acceptance must be absolute and unqualified.

Pollock on Contracts (Wald's 1st Amer. Ed., page 22, cases collated.)

Eliason vs. Henshaw, 4 Wheaton, 225.

Bishop on Contracts, sections 322-323.

Wire Mfg. Co. vs. Broderick, 12 Mo. App., 378.

Minn. R. R. Co. vs. Columbus Rolling Mills Co., 119 U. S., 149.

So that, if an acceptance be qualified, or contain terms different from the proposal, it amounts to a new proposal. There could accordingly be no purchase until there had been a proposal and an unqualified acceptance.

A contract, moreover, is made at the date of the acceptance, and does not relate back to the time of the offer.

Langdell's Summary and Law of Conts., Sec. 10 (also 7-8-9).

It follows that the repurchase of the note could

not in any event have related back to the date at which the Trust Company first indicated its readiness to take over the note, if desired so to do by the Investor's Company. But the Court of Appeals held that the repurchase was made on the 12th day of June, and that the insurable interest of the Trust Company *which supported the contract of insurance* dated from that day. It is contended by the petitioner that the interest, if any, thus acquired by the Trust Company was at best a conditional one; and the Trust Company did not become the sole and unconditional owner of the note.

IV.

The question as to the legal effect of the correspondence was properly presented for review by the appellate Court. That Court is not precluded by the findings of the Trial Court in this behalf.

The fourth question raised under our petition, in the order in which we have undertaken to present the case in this brief, relates to the holding of the majority of the Court of Appeals that the Appellate Court is concluded by the finding of the trial court that "The International Trust Company did on the 12th day of June, 1893, reacquire title to the note of said John R. Gordon by repurchase, and did reacquire an insurable interest in and to the property covered by the policy of insurance issued by defendant company; and the Trust Company did on the 12th day of June, 1893, actually pay to the said Investor's Mortgage Security Company, the sum of $1,750, being part of the amount due upon repurchase; and did assume the payment of the balance of the purchase price, viz., $50,000, and did from that

time on treat and dispose of said note as its own property."

Dissenting from the majority of the Court upon this branch of the case, Judge Sanborn said:

"I am unable to concur in the view taken by the majority of the Court, that the question whether or not there was any evidence sufficient to support a finding that The International Trust Company, of Denver, the defendant in error, had an insurable interest in the property destroyed, was not presented for our consideration by the record in these cases. At the close of the evidence counsel for plaintiff in error moved the Court for a finding and judgment in its favor, 'upon the ground that the evidence is insufficient to show a cause of action in favor of the plaintiff company, or to support a finding for the plaintiff company, or to support a judgment entered upon such finding for the plaintiff company,' and this motion was denied and an exception to this ruling of the court was taken. In my view, this motion had the same effect that a request to the Court to instruct the jury peremptorily to find for the defendant would have had if the trial had been before a jury. It is not necessary to pass upon the weight or the sufficiency of the evidence to determine this question of law. It is to be decided like a question which arises upon such a request to the jury—upon the concession that the motion must be denied if there is evidence in the record sufficient to sustain a finding for the plaintiff. Rev. Stat., Sec. 700; Clement vs. Insurance Co., 7 Blatch, 51, 53, 54, 58; Lehen vs. Dickson, 148 U. S. 71, 72, 78; Martinton vs. Fairbanks, 112 U. S. 670, 672, 674; St. Louis vs. Western Union Tel. Co., 148 U. S. 92, 96; Mercantile Trust Co. vs. Wood, 8 C. C. A.,

658; 60 Fed. Rep. 346, 348; Searcy County vs. Thompson, 13 C. C. A., 349, 354 to 358; 66 Fed. Rep. 92.

"As all the evidence relating to the insurable interest of the defendant in error consisted of letters contained in the record, this motion in my view raised the question whether or not all reasonable men upon the perusal of these letters would, in the exercise of a sound and unprejudiced judgment, come to the conclusion that these letters did not show that the defendant in error had an insurable interest in the property destroyed."

In view of the divison of the Court of Appeals upon this subject, and in view of the fact that the profession has, as counsel are advised, voiced a very decided dissent from the position taken by the Court of Appeals of this Circuit upon the proposition involved, and in further view of the fact that under the rules thus laid down by the Court of Appeals of this circuit in this and previous cases referred to in the opinion of the majority of the Court, we submit that the profession generally would be greatly benefitted by an authoritative declaration by this Court of the rule which should govern in a case of this sort, involving, as it does, the question as to the correct interpretation of the statute governing the trial of cases without the intervention of a jury. It would be of great value to the profession generally, as well as to the litigants, to have the rights of litigants who have submitted their cases to the Court upon issues both of fact and of law, to have a definite and clear and full exposition of the manner in which cases thus tried must be brought for review before the Appellate Court.

It is the opinion of counsel for the petitioner

that it is open to the Appellate Court to review upon the record here presented, the correspondence which passed between the Trust Company and the Mortgage Company relative to the repurchase of the Gordon note, in order that the Appellate Court may say whether, as a matter of law, such a repurchase and reversing of the title was effected thereby as is claimed by the defendant in error.

We say it is open in two ways: First, in the manner recognized by the learned judge who dissented upon this branch of the case from the majority of the Court, viz.: upon the ground that the motion for a judgment made at the close of the testimony was equivalent to a request in a jury trial for a peremptory instruction to return a verdict for the defendant.

And, again, we submit that the question is presented for review upon the ground not considered by the Court of Appeals, viz.: that as shown by the record, page 119, not only did the defendant below move for a judgment upon the evidence, but during the progress of the trial, prior to any findings of fact by the Court, defendant made a specific request for a ruling of law that from the correspondence between The International Trust Company and The Investor's Mortgage Security Company, the ownership and title to the Gordon note did not vest in the Trust Company until after the issuing of defendant's policy. The Court refused to make this ruling, but ruled to the contrary, and the defendant then and there duly excepted. The defendant also asked a ruling that as a matter of law the Trust Company did not have an insurable interest in the property at the time of the issuing of defendant's policy. And

to the refusal of the Court so to rule and to the making of a contrary ruling, defendant then and there excepted.

The defendant also asked for a ruling upon the evidence that the Trust Company did not have such an insurable interest either in the property or in the indebtedness as was sufficient in law to sustain the policy, and did not have the insurable interest required by the terms of the policy and mortgage clause. And to the refusal of the Court to make this ruling the defendant excepted at the time. All of this is presented by the bill of exceptions.

The Statute, Sec. 700, provides that: "The rulings of the Court in the progress of the trial of the case, if excepted to at the time and duly presented by bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal." And section 649 provides that: "The finding of the Court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

From this we infer that the finding of the Court upon the facts should not have any other or more binding or conclusive effect upon the Court of Appeals than would the verdict of a jury; from which considerations it would follow that both the rulings of the Court upon the propositions of law raised by the evidence in question would be open to review by the Appellate Court, and the refusal of the Court to grant the motion for judgment made at the close of the evidence would be equivalent to a request for a peremptory instruction to return a verdict for the defendant, and would likewise be open to review upon the evidence upon which the request so made was predicated.

In this connection we cite the following authorities in addition to those cited by His Honor, Judge Sanborn:

Lehnen vs. Dickson, 148 U. S., 72.
United States vs. Clark, 96 U. S., 37.
Hamilton vs. Insurance Company, 136 U. S., 243.
Arnold vs. Bailey, 24 S. C., 494.
Dwight vs. Germania Ins. Co., 103 N. Y., 342.
Robinson Mach. Works vs. Chandler, 56 Ind., 575.
Wason vs. Rowe, 16 Vt., 525.
Soap Co. vs. Burns, 2 Col. C. A., 89.
3 Am. & Eng. Encyc. Law, 867.

In this connection it is to be observed that the trial court itself did not find that there was an "unconditional and sole ownership" of the note; nor does the trial court find that there was such an insurable interest as would support the insurance.

The finding of the trial court was that the Trust Company did reacquire "an insurable interest" in the property. This of itself was insufficient, as a finding of fact, to support the judgment.

An insufficient finding of fact by the trial court is equivalent to no finding at all.

United States vs. Black, 94 U. S., 73.

And for a lack of a sufficient finding the cause should be remanded.

Ibid.

The Appellate Court cannot enlarge the findings of the trial court in order to sustain the judgment. In order to sustain the judgment of the trial court the findings of that Court should, in any event, show that the Trust Company had the insurable interest

required by the terms of the insurance at the time the policy of defendant company was issued. This the trial court does not find; but finds that the Trust Company reacquired "an insurable interest." But the Appellate Court cannot say that thereby the interest reacquired was sufficient to support this insurance, unless the Court is prepared to go further and to say that there is no distinction between an insurable interest and a sole and unconditional ownership.

Respectfully submitted,

SYLVESTER G. WILLIAMS,
EBENEZER T. WELLS,
MORTIMER F. TAYLOR,
Attorneys for Petitioner.

MAR 9
JAMES H. McKE

IN

The Supreme Court

OF THE

United States.

OCTOBER TERM, 1895.

THE INSURANCE COMPANY OF NORTH AMERICA,
Plaintiff in Error,
vs.
THE INTERNATIONAL TRUST COMPANY,
Defendant in Error.

906.

ARGUMENT ON BEHALF OF DEFENDANT IN ERROR, OPPOSING THE ISSUING OF A WRIT OF CERTIORARI.

A. E. PATTISON,
A. C. CAMPBELL,
Attorneys for The International Trust Company.

HENRY WISE GARNETT,
Of Counsel.

IN

The Supreme Court

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THE INSURANCE COMPANY OF NORTH AMERICA,
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vs.
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ARGUMENT ON BEHALF OF DEFENDANT IN ERROR, OPPOSING THE ISSUING OF A WRIT OF CERTIORARI.

I.

This Court has heretofore held that an application for writ of certiorari to bring up the record of the proceedings of the Court of Appeals would be granted only in a case involving questions of gravity

and importance or in the interests of uniformity of decision.

Re Lau Ow Bew, 141 U. S., 583.
Re Lau Ow Bew, 144 U. S., 47.
In re Woods, 143 U. S., 202.
American Const. Co. vs. Jacksonville & K. W. Ry. Co., 148 U. S., 372.

It is not contended by the applicants here that there is any diversity of opinion between the different Circuit Courts of Appeal relative to the doctrine laid down by the learned Court which rendered the decision sought to be reviewed by this application, and the only point that this Court is to consider is, whether the questions involved are of such gravity and importance as to demand the exercise of a power which this Court has heretofore held must be exercised sparingly.

We contend that the rulings heretofore made by this Court in the cases above cited conclusively establish the proposition that the writ should not issue under the circumstances presented by the petition; that the case is not one of such gravity and importance as would justify this Court in interfering by certiorari. However, we will briefly note the several points urged.

II.

Before going into the legal propositions involved in this case, we desire to correct some statements no doubt inadvertently made by learned counsel in the petition for certiorari.

The learned counsel for petitioner states that the ownership of the Gordon note by the Trust Com-

pany rested entirely upon certain letters and telegrams which were introduced in evidence. This statement is totally at variance with the record in the case, and while the evidence of the ownership of the Gordon note by the Trust Company was largely in the nature of telegrams and letters which passed between the Trust Company and the Scottish Investment Company, yet it was not all of the evidence upon which the title of the Trust Company in the Gordon note depended, as will be seen by an examination of the record, and particularly of the evidence of Henry W. Hobson. On this question the learned Judge who wrote the opinion in the case says, as follows:

"It matters not, we think, that the finding in question (that the Trust Company was the owner of the Gordon note), is based largely upon letters and telegrams which passed between the Trust Company and The Investor's Mortgage Security Company, and upon deductions drawn from such correspondence."

III.

The first legal proposition presented by the petition for certiorari is that the Court misapprehended the law in following the decision laid down by the same Court in the case of The Syndicate Insurance Company vs. Bohn, 12 Circuit Court of Appeals, 531; 65 Federal Rep., 165, viz., that the "effect of a mortgage clause when attached to a policy of insurance running to the mortgagee is to make a new and separate contract between the mortgagee and the Insurance Company, and to effect a separate insurance of the interests of the mortgagee dependent for its

validity solely upon the course of action of the Insurance Company and the mortgagee, and unaffected by any act or neglect of the mortgagor of which the mortgagee is ignorant, whether such act or neglect was done or permitted prior or subsequent to the issue of the mortgage clause."

The principle laid down by the Court of Appeals in relation to the effect of a mortgage clause is neither new nor novel. The Court of Appeals of the State of New York, as early as 1878, in the case of Hastings vs. Ins. Co., 73 N. Y., 141, laid down the doctrine that the effect of a mortgage clause attached to a policy of insurance was to make a separate contract between the mortgagee and the Insurance Company, and this decision has been followed by every Court, State and Federal, since that time.

Ins. Co. vs. Stanton, 57 Ill., 354.
Fogg vs. Mutual Fire Ins. Co., 10 Cush., 345.
Francis vs. Ins. Co., 7 R. I., 159.
Boynton vs. Clinton, 16 Barb., 254.
Foster vs. Equitable M. F. Ins. Co., 2 Gray, 216.
Ormsby vs. Ins. Co., 58 N. W., 301, 302.
Phoenix Ins. Co. vs. Omaha L. & T. Co., 60 N. W., 133.
May on Insurance, Vol. 1, Sec. 276.

It will be noticed that while the learned Circuit Court of Appeals in the case at bar followed the decision theretofore made by it in the case of The Syndicate Insurance Company vs. Bohn, it did not occur to the learned counsel for The Syndicate Insurance Company that the question involved was of such gravity and importance as would justify this Court in issuing a writ of certiorari; and while the

learned counsel in the Bohn case applied to the Circuit Court of Appeals for a reargument, yet when a reargument was denied, they did not apply to this Court for a writ of certiorari.

IV.

The second question urged upon this Court is, that the Court of Appeals erred in affirming the finding of the lower Court, that The International Trust Company was the owner of the Gordon note and mortgage at the time of the issuing of the policy of insurance and at the time of the fire, and had an insurable interest in the property destroyed.

The record in this case shows that from the evidence submitted to the trial Court, the Court found as a fact that prior to the issuing of the policy of insurance sued upon, and on the 12th day of June, 1893, The International Trust Company reacquired title to the Gordon note and mortgage by repurchase, and reacquired an insurable interest in the property covered by the policy of insurance issued by The Insurance Company of North America; and the record further shows that no exception was taken to the evidence submitted to the trial Court to establish this ultimate fact; and we submit that this question is not one of such gravity and importance that it justifies this Court in granting the prayer of the petitioner for writ of certiorari.

V.

The third contention of the learned counsel for petitioner is that the Court of Appeals erred in holding that the finding of the trial Court was conclusive

upon it and could not be reviewed. This ruling of the Court of Appeals is based upon and supported by decisions heretofore rendered by Federal Courts, and also by decisions of the Supreme Court of the United States. Upon this point the learned Judge who rendered the opinion in this case used the following language:

"The rule is inflexible in the Federal Court, that when a jury is waived and the Court makes a special finding, an Appellate Court cannot look into the facts upon which the finding is based, except for the purpose of ascertaining whether an error was committed in admitting or excluding testimony."

Stanley vs. Supervisors of Albany, 135 U. S., 535, 547.

Walker vs. Miller, 19 U. S. Ct. App., 403.

Searcy County vs. Thompson, 13 Cir. Ct. App., 349.

But even if the Court in this case had erred in the above ruling, it would not justify this Court in granting a writ of certiorari, as the record shows that the Circuit Court of Appeals went beyond the special findings as made by the trial Court, and, from the evidence in the case, came to the conclusion that the Circuit Court did not err in finding that the Trust Company had such an insurable interest as was sufficient to support the policy. And the Court was unanimous in the opinion that under the evidence in the case, irrespective of the special findings of the trial Court, The International Trust Company had an insurable interest in the property destroyed by fire, as early as June 12th, 1893, by virtue of the consummated agreement with The Investor's Mortgage Security Company to take up the Gordon

note which was secured by a trust deed on the insured property.

While Judge Sanborn of the Court of Appeals disagreed with Judges Caldwell and Thayer as to the binding effect of the special findings of the trial Court upon the Court of Appeals, yet all three of the Judges, from an examination of the whole record, came to the conclusion that the trial Court in rendering judgment in favor of The International Trust Company and against The Insurance Company of North America, on the policy of insurance sued upon, was a just decision.

We respectfully submit:

First—That the petition in this case does not present any question of gravity or importance such as would warrant this Court in granting the prayer of the petition; and

Second—That the Court of Appeals clearly stated the law relative to the questions involved in the case.

A. E. PATTISON,

A. C. CAMPBELL,

Attorneys for The International Trust Company.

H. T. H. Garnett

HENRY WISE GARNETT,

Of Counsel.

TRANSCRIPT OF RECORD.

UNITED STATES CIRCUIT COURT OF APPEALS

EIGHTH CIRCUIT

DECEMBER TERM, 1895.

No. 660.

THE INSURANCE COMPANY OF NORTH AMERICA, PLAINTIFF IN ERROR,

vs.

THE INTERNATIONAL TRUST COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED MAY 15, 1895.

UNITED STATES CIRCUIT COURT OF APPEALS

EIGHTH CIRCUIT

DECEMBER TERM, 1895.

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THE INSURANCE COMPANY OF NORTH AMERICA,
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FILED MAY 15, 1896.

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[Transcript page 1.]

Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit at a term thereof, begun and held at the United States Court rooms in the City of St. Louis, Missouri, on the first Monday in December, it being the second day of December, A. D. 1895, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn and Honorable Amos M. Thayer, Circuit Judges.

Attest: JOHN D. JORDAN,
[SEAL] Clerk U. S. Circuit Court of Appeals,
Eighth Circuit.

Be It Remembered, That heretofore, to-wit, on the fifteenth day of June, A. D. 1895, a transcript of record, in pursuance to a Writ of Error directed to the Circuit Court of the United States for the District of Colorado, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the Insurance Company of North America was Plaintiff in Error and the International Trust Company, Defendant in Error, which said transcript of record, as printed for the use of said Court by stipulation of parties, is in the following words, to-wit:

a In the United States Circuit Court of Appeals
Eighth Circuit.

The Insurance Company of North America, Plaintiff in Error,
vs.
The International Trust Company, Defendant in Error.

Copy of statement of the parts of the record in the above entitled cause, which Plaintiff in Error thinks necessary for consideration of the errors assigned and directs the same to be printed according to the rules of this Court.

1. Amended complaint, omitting endorsement.

2. Answer, omitting verification and endorsement.

3. Replication, omitting verification and endorsement.

4. The following portions of Exhibits "A" and "B" of the complaint, being policy of plaintiff in error and mortgage clause thereto attached, issued January 6th, 1893, and expiring July 6th, 1893, to be designated in printed record as "material parts of policy of plaintiff in error, No. 1934, expiring July 6th, 1893," viz:—(a) Beginning with the words "In consideration of the receipt" and ending with the words "other concurrent insurance permitted." (b) The Mortgage (or Trustee) clause in full, which begins with the words, "Whereas the property described in this policy has been conveyed, etc.," and ends with the words "The International Trust Company,

By....."

b (c) The first five numbered lines of policy, No. 1, 2, 3, 4, 5.

(d) All of paragraph VI.—"Conditions as to renewal, etc.," except last sentence which begins with the words, "the cost of, etc."

5. The bill of exceptions in full down to the exhibits.

6. The exhibits and memoranda thereof, as set out in bill of exceptions:

"Memorandum"—

Exhibits 1, 2, 3, 4, 5.

Exhibit 6, (omitting lightning clause and gasoline stove permit;)

Exhibits 7, 8. 9.

For Exhibit 10, print as follows:—"Exhibit 10—Notice of loss from International Trust Company to Insurance Company of North America, October 12th, 1893."

Exhibit 11.

Exhibit 12, omitting verification and magistrate's certificate, but inserting the word "verified." Also omitting the Exhibits "A" and "B" attached to this exhibit, but print "Exhibit "C" thereof.

Exhibits 19, 20, 21, 27, 32, 33, 34, 35, 36, 37, and Exhibits "A" and "B"; formal closing of bill of exceptions.

7. Final Judgment.

8. Assignment of Errors.

SYLVESTER G. WILLIAMS,
WELLS, TAYLOR & TAYLOR,
O. K. Attys. for Plaintiff in Error.

A. C. CAMPBELL,
Attorney for Defendant in Error.

c In the United States Circuit Court of Appeals Eighth Circuit.

The Insurance Company of North America, Plaintiff in Error,
vs.
The International Trust Company, Defendant in Error.

To The International Trust Company, or its Attorneys of Record.

Gentlemen:—

Herewith we hand you Copy of Statement of the parts of record which we think necessary on behalf of plaintiff in error for the consideration of the errors assigned in the above entitled cause, which plaintiff in error has designated to the Clerk of the Court to be printed.

Kindly acknowledge service, and oblige.

Very truly yours,

SYLVESTER G. WILLIAMS,
Attorney for Plaintiff in Error.

Service of copy of above mentioned statement received this 24th day of May, 1895.

A. C. CAMPBELL,
Attorney for Defendant in Error.

No. 660. In the U. S. Circuit Court of Appeals. Eighth Circuit. The Insurance Company of North America, Plaintiff in Error, vs. The International Trust Company, Defendant in Error. Designation by Plff. in Error of record to be printed. Filed June 15, 1895. John D. Jordan, Clerk. Sylvester G. Williams, Attorney for Plaintiff in Error.

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30 In the Circuit Court of the United States within and for the District of Colorado.

AMENDED COMPLAINT.

The International Trust Company, Complainant,

vs.

Insurance Company of North America, Defendant.

Now comes the International Trust Company, plaintiff, as aforesaid, and for cause of action against the Insurance Company of North America, defendant (a fire insurance corporation), alleges as follows, to-wit:

I.

That plaintiff Company is a corporation, organized, existing and doing business under and in pursuance of the laws of the State of Colorado, in the City of Denver and State of Colorado, and was such on the 12th day of December, 1892, and ever since up to the present time.

II.

That the defendant, the Insurance Company of North America, is a corporation established and existing under the
31 laws of the State of Pennsylvania and doing business in the State of Colorado under and in pursuance of the laws of said State, from the 26th day of July, 1893, up to the present time.

III.

That the matter in dispute in this action, exclusive of costs and interest, exceeds in value the sum of two thousand dollars.

IV.

That on or about the 26th day of June, 1893, one John R. Gordon, a citizen of the State of Colorado, was, subject to the

encumbrance hereinafter set out, the owner of Lots 8, 9, 10, 11, 12, 13, 14, 15 and 16, in Block 126, in the former town of South Pueblo, now, City of Pueblo, State of Colorado, and had been the owner of said lots at all times between the 12th day of December, 1892, and the 26th day of June, 1893; that the said John R. Gordon had theretofore commenced and on June 26th, 1893, had partially completed a hotel building upon said lots, and had expended upon the same a large amount of money, to-wit, over $125,000.

V.

That on the 26th day of June, 1893, the said John R. Gordon was indebted to the plaintiff Company in the sum of $50,000, which said sum of money he had borrowed on December 12th, 1892, and in evidence thereof had executed his certain promissory note, dated December 12th, 1892, for the sum of
32 $50,000 with interest at the rate of 7 per cent per annum. to maturity, and 10 per cent. per annum after maturity, payable June 12th, 1893, to plaintiff Company or its order. That to secure said note and the payment of the sum of money borrowed as aforesaid, the said Gordon did furthermore and on, to-wit, December 12th, 1892, execute and deliver his certain deed of trust to Mahlon D. Thatcher, Trustee, upon all of the lots hereinbefore set out, together with all buildings and improvements thereon, or thereafter to be put upon the same, and all and singular the tenements, hereditaments and appurtenances thereunto belonging, with the usual power of sale of said property in case said note and interest were not paid.

VI.

That on the 26th day of June, 1893, said note was wholly unpaid and said deed of trust was in full force and effect; and said note is still due and payable to plaintiff Company and said deed of trust is still a lien in favor of plaintiff upon said property; nor was said note or any portion thereof paid on the 9th day of October, 1893, the date upon which the buildings upon said lots were destroyed by fire, as hereinafter set out. Plaintiff alleges that on the 26th day of June, 1893, and at all times between said date and the 9th day of October, 1893, it had and possessed a good and insurable interest in the property aforesaid, under and by virtue of the indebtedness
33 of the said John R. Gordon, as aforesaid, and the deed of trust securing the same, to the amouut of $50,000, with interest thereon according to the terms of said note.

VII.

Plaintiff furthermore alleges, that on, to-wit, the 26th day of June, 1893, defendant Company, then having an insurance risk

upon the property aforesaid, extending to the 6th day of July, 1893, did, at the special instance and request of plaintiff Company, and also at the special instance and request of the said John R. Gordon execute, issue and deliver to plaintiff Company, by and through its agents thereunto duly authorized, its renewal policy of insurance, numbered 2085, under and by which defendant Company did agree to insure and did insure against loss by fire the buildings situated upon said lots, as set out and described in said policy of insurance, and other property in said policy set out and described, in the amount of $10,000 for six months from the 6th day of July, 1893; and for greater particularity reference is hereby made to said policy of insurance. And defendant Company did furthermore and contemporaneously with the execution of said policy of insurance, attach to the same a mortgagee clause or agreement for the benefit and protection of plaintiff Company and its assigns, making the loss, if any, upon the building set out and described in said policy of insurance payable to plaintiff Company and its
34 assigns; and said renewal policy of insurance and mortgagee clause thereto attached are fully set out in Exhibit "C" with the original complaint herein, which is Exhibit "A" herewith filed and prayed to be taken as a part of this complaint. That after the execution and issuance of said renewal policy of insurance, with mortgagee clause attached as aforesaid, and on or about June 26th, 1893, the same was in due course of business delivered to and accepted by plaintiff Company, subject to the terms and conditions thereof for the protection of itself and its assigns.

VIII.

Plaintiff Company furthermore alleges that said renewal policy of insurance was issued not only in pursuance of an agreement between the said John R. Gordon and defendant Company, but in pursuance of direct negotiations and agreements between plaintiff Company and defendant Company, and defendant Company at the time the same was issued, understood and agreed that said policy of insurance was for the special benefit and protection of plaintiff Company and its assigns, and in consideration thereof plaintiff Company did covenant and agree that it would undertake to do and perform the things required of it by and under said mortgagee clause attached to said renewal policy of insurance, and especially that upon the demand of the defendant Company it would pay any premium which should be unpaid upon said policy.

35 IX.

Plaintiff furthermore alleges that afterwards, and on or about the ——— day of September, 1893, the said John R.

Gordon, not having paid the premium upon the policy of insurance aforesaid, defendant Company did, by and through its agents, make demand upon plaintiff Company, who was then and there the holder, owner and possessor of the note of the said John R. Gordon, and the indebtedness thereby evidenced, for such premium, and thereupon and on, to wit, the 26th day of September, 1893, plaintiff Company did pay to defendant Company the full amount of the premium due for the insurance, as aforesaid, which said premium defendant Company accepted and appropriated to its own use and benefit and has ever since retained and held the same,—the premium so paid being the sum of one hundred and five dollars ($105.00).

X.

Plaintiff furthermore alleges that on, to-wit, the 9th day of October, 1893, and whilst the agreement of insurance as hereinbefore set out on the part of defendant Company was in full force and effect for the benefit and protection of plaintiff Company, the property covered by the insurance agreement of defendant Company, including the buildings, foundations and all parts thereof, was almost, if not totally destroyed by fire; that the direct loss and damage were within the terms and
36. provisions of the agreement of insurance of defendant Company, as hereinbefore set out, and the mortgagee clause or agreement forming a part thereof, and exceeded the sum of $125,000; that at the time of such loss and damage plaintiff Company was the sole owner of the note of John R. Gordon aforesaid and the indebtedness thereby evidenced, and was alone entitled to the benefit and protection of the mortgagee clause or agreement forming a part of the agreement of insurance by defendant Company, as aforesaid; that thereupon and under and by virtue of the provisions of said agreement of insurance and the mortgagee clause or agreement forming a part thereof, plaintiff Company became entitled to demand and receive of and from defendant Company the sum of $10,000 on account of said loss or damage.

XI.

Plaintiff furthermore alleges, that immediately after said fire has occurred, plaintiff Company for and on its own behalf, and as the beneficiary under the agreement of insurance, as aforesaid, with loss payable to it, proceeded to give notice of said fire and the loss arising therefrom, and of the interests of plaintiff Company, in writing, to defendant Company, and did proceed to do all other acts and things required of it by defendant's policy or agreement of insurance aforesaid; that furthermore and within the time required by said policy of in-

surance, and on, to-wit, the 2nd day of November, 1893,
37 plaintiff Company for itself and as the payee of the loss under said policy, did proceed to furnish full and complete proofs in writing, as called for and required by said policy of insurance, of said fire and the loss thereby occasioned, in accordance with the terms and provisions of defendant's agreement of insurance, which said proofs of loss were received and accepted by defendant Company.

XII.

Plaintiff furthermore alleges that it hath, both before and since said fire, done all things and performed all acts required of it by defendant Company under its agreement of insurance, as aforesaid, or by the mortgagee clause or agreement thereto attached and forming a part thereof. And plaintiff furthermore alleges, that in addition to the notice and proof furnished by plaintiff Company the said John R. Gordon did immediately give notice of said fire to defendant Company, and did then and there and within the time required by defendant's policy of insurance, furnish proofs of loss as required by said policy of insurance, which said notice and proofs of loss were in his own behalf and independent of plaintiff's notice and proofs of loss, subject, however, to plaintiff's rights under said mortgagee clause.

Plaintiff Company furthermore alleges, that it is now the sole owner of the said note of the said John R. Gordon and the indebtedness thereby evidenced; that at the time said fire
38 occurred there was other insurance upon said property in addition to the insurance carried by defendant Company, amounting to $40,000; that since said fire $10,000 of such insurance has been paid to plaintiff Company and has been applied on the indebtedness of said John R. Gordon, leaving at the beginning of this suit $43965.42 due plaintiff Company upon the same.

Plaintiff furthermore alleges, that it has at all times done all things and performed all acts required of it by the terms of defendant's agreement of insurance and the mortgagee clause and agreement thereto attached, and has performed all covenants and agreements by it undertaken; that it is now and has at all times since said fire occurred, been entitled to demand and receive from defendant Company the sum of $10,000, under its agreement of insurance aforesaid; that notwithstanding such fact and notwithstanding the frequent demands of plaintiff Company upon defendant Company, the said defendant Company hath failed and refused to pay to plaintiff Company the sum of $10,000 aforesaid, or any part thereof, and the same

and the whole thereof is now due on account of the direct loss and damage to said building and property by fire, as aforesaid.

Plaintiff furthermore alleges, that more than sixty days have elapsed and expired since proofs were furnished by plaintiff Company, and also more than sixty days haxe expired since proofs were furnished by the said John R.
39 Gordon.

Wherefore, Plaintiff prays judgment against defendant Company for the sum of ten thousand dollars ($10,000), with interest thereon from the 9th day of October, 1893, until paid and for costs of this suit.

PATTISON, EDSALL & HOBSON,
Attorneys for Plaintiff.

* * * * * * *

("Material parts of policy of plaintiff in error, No. 1934, expiring July 6th, 1893.")

* * * * * * *

14 In consideration of the receipt of One Hundred and five and no/100 Dollars Do Insure J. R. Gordon against loss or damage by Fire to an amount not exceeding Ten Thousand Dollars.

This insurance is subject to the conditions of the printed form, attached to and made a part of this policy.

$10,000—On the six story and basement, stone, brick and iron building, in course of construction, including foundations plate glass of all sizes, while set in said building, frescoed work and gilding on walls and ceilings, heating apparatus, plumbing, sewer, gas and water pipes, radiators, tiling, gas and electric light fixtures, chandeliers and electric light wiring, elevator and elevator apparatus and fixtures, and sidewalks around said building, and on all building material, supplies and machinery contained in and about above premises; and in frame carpenter shop adjoining; situate on Lots Nos. 8, 9, 10, 11, 12, 13, 14, 15 and 16, in Block No. 126, of the former town of South Pueblo, now city of Pueblo, Colorado.
15

To be occupied and known as the "Hotel Mesa"

Lightning clause and gasoline stove permit attached to Policy.

Other concurrent insurance permitted.

* * * * * * *

16 Whereas, The property described in this Policy has been conveyed to Mahlon D. Thatcher in trust, to secure the payment of a certain indebtedness to the International Trust Company, Denver, Colorado.

And Whereas, the owner of the Policy has requested that the loss, if any, be made payable to the said Company. Therefore, the loss, if any, is made payable to The International Trust Company, Denver, Colorado, and its assigns.

It being hereby understood and agreed, That this insurance, as to the interest of the Mortgagee or Trustee only therein, shall not be invalidated by any act or neglect of the Mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this Policy. Provided, that in case the Mortgagor or owner neglects or refuses to pay any premium due under this Policy, then on demand, the Mortgagee or Trustee shall pay the same. Provided, also, that the Mortgagee or Trustee shall notify this Company of any change of ownership or increase of hazard which shall come to his, or their knowledge, and shall have permission for such change of ownership or increase of hazard duly endorsed on this Policy. And Provided Further, that every increase of hazard not permitted by the Policy to the Mortgagor or owner, shall be paid for by the Mortgagee or Trustee on reasonable demand, and after demand made by this Company upon, and refusal by the Mortgagor or owner to pay, according to the established schedule of rates. It is, however, understood that this Company reserves the right to cancel this Policy, as stipulated in the printed conditions of said Policy; and also, to cancel this agreement on giving ten days' notice of its intention to the Trustee or Mortgagee named therein, and from and after the expiration of the said ten days this agreement shall be null and void. It is further agreed that in case of any other insurance upon the property hereby insured, then this Company shall not be liable, under this Policy, for a greater portion of any loss sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein. It is also Agreed that whenever this Company shall pay the Mortgagee or Trustee any sum for loss under this Policy, and shall claim that as to the Mortgagor or owner no liability therefor exists, it shall at once and to the extent of such payment be legally subrogated to all the rights of the party to whom such payment shall be made, under any and all securities held by such party for the payment of said debt. But such subrogation shall be in subordination to the claim of said party for the balance of the debt so secured. Or said

Company may, at its option, pay the said Mortgagee or Trustee the whole debt so secured, with all the interest which may have accrued thereon to the date of such payment, and shall thereupon receive from the party to whom such payment shall be made an assignment and transfer of said debt, with all securities held by said parties for the payment thereof.

In testimony that the foregoing provisions are made a part of Policy No. 1801, of the Insurance Company of North America to which they are attached, witness my hand at Pueblo Colorado this Fourteenth day of December, A. D. 1892.

BENSON, KIRTLAND & RICE,
Agents.

Accepted and agreed to by
THE INTERNATIONAL TRUST COMPANY.

By

Exhibit B with complaint.

* * * * * * *

18 (1) I.—Loss or Damage for which the Company is not liable.—Provision relative to damage (2) by removal.—This Company shall not be liable, by virtue of this Policy, for loss or damage by fire caused by invasion, insurrection, (3) riot, civil commotion, military or usurped power; or by neglect of, or deviation from, municipal ordinances or regulations made to prevent (4) accidents from fires; or by the absence in buildings of good and substantial stone or brick chimneys; or by the use of open lights in barns (5) and stables, or where wood shavings are made; or by depositing ashes in buildings in wooden vessels; or by any culpable carelessness, or (6) wilful or unlawful act of the assured.

* * * * * * *

19 (1) VI.—Conditions as to Renewals and Cancellations.—Miscellaneous Provisions.—All (2) renewals of this Policy, to be valid, must be made by virtue of Certificates of Renewal, signed by the President and Secretary of the Company, (3) and countersigned by the duly authorized Agent of the Company at the place of issue thereof. Every renewal shall be considered as made (4) with reference to the original representations as to character, condition, value, situation, occupancy, incumbrance, exposures, and otherwise, (5) unless varied by new representations reported by the assured, either before or at the time of such renewal, certified to by proper entry hereon. (6) This Policy shall be subject to cancellation at any time, at the request of the assured, the Company to retain earned premium reckoned at the (7) usual short rate for the time expired. The

Policy may also be at any time cancelled by the Company, on refunding or tendering to the assured, (8) his, her, or their agent or representative, a ratable proportion of the premium for the time unexpired, and where the insurance is made (9) payable to a third party, as collateral security, it shall not be necessary to give notice to, and have the consent of, said third party, in order (10) to effect such cancellation. Any person other than the assured, who may have applied for or procured this Policy, or any renewal thereof, (11) shall therein be deemed to have acted as the agent of the assured and not of this Company. Agents of this Company have no authority to (12) bind the Company in violation of any of the printed terms or conditions of insurance as herein expressed; and no printed or written (13) condition or restriction hereof, which, by its terms, may be subject to waiver, shall be deemed to have been waived, except by a distinct, specific agreement, clearly expressed in the body of the policy.

* * * * * * *

20 (Indorsed.)—3060. Circuit Court United States. The International Trust Company vs. The Insurance Co. of North America. Exhibits A & B with complaint. Filed Feb. 16, 1894. Robert Bailey, Clerk U. S. Circuit Court.

* * * * * * *

40 In the Circuit Court of the United States, Within and for the District of Colorado.

The International Trust Company, Plaintiff,

vs.

The Insurance Company of North America, Defendant.

ANSWER.

Now comes the defendant, by its attorney, Sylvester G. Williams, and for answer to the complaint, says:

Defendant admits the residence and citizenship and corporate capacity of the parties as alleged in the complaint; and that the defendant Company was, at the times mentioned in the complaint, doing business in the State of Colorado, under and in pursuance of the laws of said State.

Admits that the matters in dispute, exceed Two thousand dollars ($2,000.) in value, exclusive of interest and costs.

41 As to whether, on or about the 26th day of June, 1893, or at any time, the said John R. Gordon, was the owner of the lots described in the complaint, defendant has not, and cannot obtain sufficient knowledge or information whereon to base a belief, and therefore denies that the said John R. Gordon was at any time the owner of said lots.

Defendant admits that the said Gordon had theretofore commenced, and on June 26th, 1893, had partially completed the hotel building upon said lots. The defendant does not know, and has no means of knowing what amount the said Gordon had expended upon said building, and therefore denies that said Gordon had expended the sum of $125,000. upon said building, or any amount.

As to whether on the 26th day of June, 1893, the said Gordon was indebted to the plaintiff Company, in the sum of $50,000. or in any sum; or as to whether the said Gordon had in evidence thereof executed his promissory note therefor, or as to what were the terms of said note, and as to whether the said Gordon did, on the 12th day of December, 1892, or at any time, execute or deliver his deed of trust to Mahlon D. Thatcher, Trustee, or to any trustee, upon the lots described, together with the buildings and improvements thereon or otherwise, or as to what were the terms or powers conferred by said alleged deed of trust, defendant has not, and cannot obtain sufficient knowledge
42 or information whereon to base a belief, and therefore denies all of said allegations of the complaint.

As to whether, on the 26th day of June, 1893, or at any time, said note was unpaid, or as to whether said deed of trust was then in force and effect, or as to whether said note is still due and payable, to plaintiff Company, or as to whether said deed of trust is still a lien in favor of the plaintiff Company, or as to whether said note or any portion thereof was unpaid on the 9th of October, 1893, or as to whether the plaintiff on the 26th day of June, 1893, or on the 9th day of October, 1893, or at any time, had or possessed a good or insurable interest in the property aforesaid, or any interest therein, by virtue of the alleged indebtedness, or deed of trust or otherwise, defendant has not and cannot obtain sufficient knowledge or information whereon to base a belief, and therefore denies all the allegations of the complaint in this behalf made.

Defendant denies that on the 26th day of June, 1893, the defendant did execute, issue or deliver to plaintiff Company, either at the instance and request of the plaintiff Company, or otherwise, the policy of insurance and mortgage clause, numbered 2,085, of the description in the complaint set out, or any policy or mortgage clause.

But defendant says: That on the said 26th day of
43 June, 1893, the local agent of defendant Company, at Pueblo, Colorado, did counter-sign a policy of the number and description aforesaid, to the end that said policy might be executed, issued and delivered to said Gordon, and to take effect, on and after the 6th day of July, 1893, upon a supposed

interest of the said Gordon, in the property described, as in said policy particularly set out, and as therein limited and required; and according to the exact tenor, terms and conditions of the said policy, with mortgage clause attached, as therein set forth, and not otherwise.

Defendant believes that the Exhibit "C." referred to in the complaint, is in substance a correct copy of said policy and mortgage clause; but for greater certainty, prays leave to refer to the original policy and mortgage clause when produced to this Court; and demands proof of said policy and mortgage clause.

Defendant admits that plaintiff corporation, did on or about the 26th day of September, 1893, pay the premium upon said policy, but defendant says: That said payment was made, by said plaintiff Company, for and on account of, and on behalf of the said John R. Gordon; and at the instance and request of said Gordon, and as plaintiff is informed and believes, by and under an arrangement made by and between the said Gordon and the plaintiff corporation.

Defendant denies that the defendant has accepted, or appropriated to its own use and benefit, the said premium; or
44 that it has ever since retained and held the same; but avers, that the defendant duly offered, as hereinafter set forth, to return to the plaintiff corporation, all of said premium.

Defendant admits, that on or about the 9th day of October, 1893, the property described in the policy was almost, if not totally destroyed by fire; but denies that the loss and damage were within the terms or provisions of the alleged insurance, or mortgage clause; and denies that said loss exceeded or amounted to the sum of $125,000.

Defendant does not know what the amount of loss thereon was, or whether or not it amounted to the sum of the insurance thereon; and demands proof of the amount of such loss.

As to whether plaintiff Company was, at the time of the alleged loss, the owner of the alleged note of John R. Gordon, or of the indebteduess thereby evidenced, defendant has not, and cannot obtain sufficient knowlege or information whereon to base a belief, but denies that plaintiff Company was entitled to any benefit or protection under the said mortgage clause of said policy; and denies that the plaintiff became entitled to receive any sum whatsoever from defendant, on account of said alleged loss or damage.

Defendant admits that the plaintiff Company, gave notice of the said fire and pretended loss, and of an alleged in-
45 terest of the plaintiff Company; and admits that the plaintiff furnished a pretended statement of an alleged loss and claim under said policy and mortgage clause; but denies that the plaintiff did, within the time required by said policy, or at any time, furnish full or complete proofs of loss as required by said policy.

Defendant denies that the plaintiff has done or performed the acts required by the alleged agreement or insurance, or mortgage clause.

Defendant admits that said Gordon gave notice of the loss, and furnished a pretended statement and alleged proof of loss; but denies that said statement and alleged proof of loss, were such as were provided for and required by said policy.

As to whether the plaintiff Company is now the owner of the alleged notes, securities or indebtedness, defendant has not, and cannot obtain sufficient knowledge or information whereon to base a belief, and therefore denies the allegation of the complaint in this behalf.

As to what amount if any, of other insurance there was upon said property, or as to what amount had been paid, or as to what amount at the beginning of this action was due to the said plaintiff corporation, upon the indebtedness of the said Gordon, defendant has not, and cannot obtain sufficient knowl-
edge or information whereon to base a belief, and there-
46 fore denies the allegations of the complaint in that behalf.

Defendant denies that 60 days have elapsed between the time at which the alleged and pretended proof and statement of loss were furnished, and the beginning of this action. And avers that this action was brought within much less than 60 days after the furnishing of said pretended proof of loss.

Defendant denies each and every other allegation of the complaint, not herein, or hereinafter expressly admitted.

II.

For a further answer, and a first affirmative defense, defendant says: That the said policy of defendant issued to the said Gordon, and the said mortgage clause thereto attached, were issued and accepted subject to the terms, stipulations and warranties contained and set forth therein, and according to the true and express purport and tenor thereof. That said policy purported to insure only the interest of the said John

R. Gordon in the said property, as the unconditional and sole owner thereof, and to the extent and according to the nature and amount of such interest, only as is particularly described, limited, set forth and required by the terms of said policy; and for a better and fuller statement and exposition of the interest so agreed upon, to be insured, it was in said policy, particularly and expressly provided as follows:

"This entire policy shall be void, if the insured has concealed or misrepresented, in writing or otherwise, any
47 material fact or circumstance concerning this insurance, or the subject thereof; or if the interest of the insured in the property, be not truly stated herein."

And further it was provided as follows:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple."

And defendant says: That at the time said policy was made, executed, issued and delivered, to-wit: on the 6th day of July, 1893, the said John R. Gordon, was not the unconditional and sole owner of the said property; and the ground on which said building stood was not owned by said Gordon in fee simple; but as defendant is now informed and believes, the said Gordon had, long prior thereto, sold, transferred and conveyed, all of his right, title and interest therein, to the Mesa Hotel and Improvement Company.

Further answering in this behalf, defendant says: That having agreed to insure the interest as aforesaid of the said Gordon, against loss which might be occasioned by fire to the property described, defendant further by the mortgage clause and agreement attached to said policy, which was so attached for the benefit and convenience of the said Gordon, and at his sole instance and request, for the purpose, as defendant is informed and believes, of enabling said Gordon the better to secure certain indebtedness, then and for a long time
48 prior thereto owing by said Gordon, to the plaintiff corporation, did agree, that if any loss should be sustained under said policy, upon the interest of the said Gordon as aforesaid, sought to be insured as aforesaid, such loss should be payable to the plaintiff corporation, The International Trust Company; all as more particularly set out in the said mortgage clause. But as defendant is by counsel advised, and because of the fact that on the 6th day of July, 1893, and long prior thereto, the said Gordon did not have any interest in, or

title to the said property, as required by said policy as aforesaid; both the said policy and the said mortgage clause, were at all times void and of no effect, force or virtue.

And further answering in this behalf, defendant says: That one of the conditions of said policy was as follows:

"This policy shall be cancelled at any time, at the request of the insured; or by the Company by giving five days notice of such cancellation. If this policy shall be cancelled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this Company retaining the customary short rate; except that when this policy is cancelled by this company by giving notice, it shall retain only the pro rata premium."

And defendant says: That when the defendant was informed of the facts aforesaid, and was informed and advised that said policy and mortgage clause were wholly void, and that
49 no liability existed under or by virtue of said policy, or of said mortgage clause, and long prior to the bringing of this action, defendant offered to return and tendered to the plaintiff corporation, the full amount of all premiums and considerations advanced by plaintiff corporation; but plaintiffs refused to accept said sum or any sum other than the full amount of the said policy.

III.

And for a further answer and a second affirmative defense, defendant says: That among the conditions of said policy it was provided as follows:

"If fire occur, the insured shall give immediate notice of any loss thereby in writing to this Company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within 60 days after the fire, unless such time is extended in writing by this Company, shall render a statement to this Company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof, and the amount of loss thereon; all incumbrances thereon, all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession or exposures of said property, since the issuing of this policy; by

whom and for what purpose any building herein described, and the several parts thereof were occupied at the time of fire."

And further, it was provided as follows:

50 "In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this Company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them, and shall bear equally the expenses of the appraisal and umpire.

"This Company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof, by any requirement, act or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award of appraisers, when appraisal has been required."

And further it was provided as follows:

"No suit or action on this policy for the recovery of any claim, shall be sustainable in any Court of law or equity, until after full compliance by the insured, with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

And defendant further says: That soon after the alleged fire, to-wit: On or about the 2nd day of November, 1893, the plaintiff and the said John R. Gordon, proceeded to make and present a pretended statement and proof of loss, which was, and was found by the plaintiff to be materially defective and insufficient and erroneous, and said statement and proof of loss
51 was thereupon and on or about the 16th day of January, 1894, revoked and recalled by the plaintiffs, and a new and amended statement and proof of loss was then and there furnished; but defendant says: That said amended statement and proof of loss was not furnished sixty days prior to the bringing of this suit.

And defendant further says: That the amount of sound value and of loss upon said property has not at any time been ascertained or determined, either by agreement or by appraisement.

Wherefore, as defendant is by counsel advised, the loss if any, sustained by plaintiff or by the said Gordon, under or by virtue of said policy or mortgage clause, is not and has not become due or payable.

IV.

And for a further answer, and a third affirmative defense, defendant says: upon information and belief, that long prior to the 6th day of July, 1893, and long prior to the 26th day of June, 1893, and prior to the 26th day of February, 1893, but at a date which this defendant is unable with uncertainty to state, the plaintiff corporation sold, transferred and assigned to The Investor's Mortgage Security Company, Limited, of Scotland, Kingdom of Great Britian, and Ireland, all of its right, title and interest, in and to the note and securities and indebtedness of and from said John R. Gordon, to the said plaintiff corporation; and neither on the 6th day of July, 1893, nor on the 26th day of June aforesaid, was the plaintiff corporation the
52 owner or holder of such indebtedness or securities; but at all times between the dates aforesaid, and the 26th day of February, 1893, said note, securities and indebtedness, were held and owned by the said Investor's Mortgage Security Company, Limited; and at the dates aforesaid, the plaiptiff corporation had no title or interest therein; and had ceased wholly to be the owner or holder thereof.

Wherefore, as defendant is by counsel advised, the policy sued upon herein, and the mortgage clause thereto attached, were null and void, and were at no time of any validity, force or effect.

V.

And for a further answer, and a fourth affirmative defense defendant says: That among the conditions of the said policy, was the following:

"This entire policy, unless otherwise provided by agreement endorsed hereon, or added thereto, shall be void * * * if the hazard be increased by any means within the control or knowledge of the insured; * * * * * * * or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied, and so remain for ten days."

And defendant says: That after the 6th day of July, 1893, and after the issuance of the said policy, and long before the

alleged fire, the hazard connected with said property
53 was greatly increased by means within the control and knowledge of the insured, by reason of the fact that building operations upon said property were suspended, while said building was unfinished and incomplete, and said building was left standing in an unfinished state, open, unoccupied, abandoned and exposed, and without any watchman or custodian in charge, and so remained up to the time of its destruction by fire; all without the agreement of defendant endorsed upon said policy, or added thereto, or otherwise.

Wherefore, as defendant is by counsel advised, said policy was wholly void as to the said John R. Gordon.

And further answering, defendant says: That a condition of the mortgage clause attached to the policy was as follows:

"This insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property; * * * * * * * nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; * * * * * * Provided also, that the mortgagee (or trustee) shall notify this Company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall on demand pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void."

But defendant alleges, and as will appear more fully from the mortgage clause, attached to said policy, and set out
54 by the plaintiff in its complaint, herein filed, that said Mahlon D. Thatcher, Trustee, had no interest whatsoever in the insurance under said policy, or mortgage clause; but the loss if any thereunder was payable to the plaintiff corporation; That the plaintiff was not in any wise exempted from the acts or neglect of the said Gordon, the mortgagor or owner of the described property.

Wherefore, as defendant is by counsel advised, the said mortgage clause was likewise rendered wholly void, and was void at the time of the alleged fire.

And further answering in this behalf, defendant says, upon information and belief, that the plaintiff corporation was furthermore informed and aware of the fact that the hazard connected with said property was greatly increased as aforesaid, and yet although said facts were well known to defendant, plaintiffs and the said trustee, nevertheless the

plaintiff wholly neglected and failed to obtain from defendant consent for the existence and continuance of said increased hazard, and wholly failed and neglected to have any permission therefor indorsed upon the policy, or to pay any premium for such increased hazard. And although plaintiffs were informed that in order to secure permission for the continuance of said insurance by defendant Company, it would be necessary among other things to provide and have a watchman upon said premises, nevertheless although
55 plaintiffs could and should have procured a watchman to be placed in charge of said property, the plaintiffs wholly neglected and failed to procure or to have procured a watchman for said premises; but allowed said premises and building to remain open and unprotected and in the condition of increased hazard as aforesaid, up to the time of the destruction of the said building by fire.

Wherefore, as defendant is by counsel advised, said policy and mortgage clause were wholly void at the time of the alleged fire.

VI.

And for a further answer and fifth affirmative defense defendant says that among the conditions of the said policy was the following:

"This entire policy unless otherwise provided by agreement endorsed hereon or added hereto shall be void * * * * * if any change, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise,"

and it was in said mortgage clause provided among other things as follows:

"This insurance is to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property * * * * * nor by any change in the title or owner-
56 ship of the property * * * * * provided also that the mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and unless permitted by this policy, it shall be noted thereon * * * * *"

And defendant further says upon information and belief that on or about the 3rd day of July, 1893, the said John R. Gordon sold, transferred and conveyed to the Mesa Hotel &

Improvement Company all his right, title and interest in the Hotel Building described in said policy and in the ground whereon said building stood, whereby by virtue of the conditions aforesaid the policy of defendant was rendered wholly void as to the said Gordon.

But defendant alleges, as will appear more fully from the mortgage clause attached to said policy, and set out by the plaintiff in its complaint herein filed, said Mahlon D. Thatcher trustee, had no interest whatsoever in the insurance under said policy or mortgage clause; but the loss if any thereunder was payable to the plaintiff corporation. That said plaintiff corporation was not in any wise exempted from the acts or neglect of the said Gordon, the mortgagor or owner of the described property.

Wherefore, as defendant is by counsel advised, the said mortgage clause was likewise rendered wholly void, and was void at the time of the alleged fire.

57 And further answering, defendant says, upon information and belief, that the plaintiff corporation, as well as the said Mahlon D. Thatcher, were fully informed of the said sale and transfer, and change of ownership by the said Gordon; yet fully knowing that the ownership of said property had been changed as aforesaid, nevertheless both the plaintiff and the said Thatcher wholly failed and neglected to notify the defendant of the said change of ownership, and wholly failed and neglected to have said change of ownership noted upon the policy.

Wherefore, as defendant is by counsel advised, said policy and mortgage clause were wholly void at the time of said fire.

Wherefore, Having fully answered, defendant prays to be dismissed hence without day, and that it recover all costs herein expended.

SYLVESTER G. WILLIAMS,
Attorney for Defendant.

* * * * * * *

58 In the Circuit Court of the United States within and for the District of Colorado.

REPLICATION.

The International Trust Company, Plaintiff,

vs.

Insurance Company of North America, Defendant.

Now comes The International Trust Company, plaintiff in the above entitled action, by counsel, and files this, its replication

to the answer of the defendant Company, filed on the———day of———

First. Plaintiff denies, as is alleged on page 3 of said answer, that the premium paid by plaintiff on the policy upon which this suit is brought, was paid for and on account of John R. Gordon, or at his instance and request, or under any arrangement between the said Gordon and plaintiff corporation. On the contrary, plaintiff alleges that said payment was made upon the direct demand of defendant Company and was without any notice or knowledge of said Gordon, whatsoever, but was in pursuance of a contract between plaintiff and defendant, as set out in the mortgagee clause attached to said policy.

59

Second. Plaintiff denies, as is alleged on page 5 of said answer, that the policy of insurance upon which this suit is brought purported to insure only the interest of John R. Gordon in said property, but on the contrary, plaintiff alleges that defendant Company issued said policy in pursuance of a contract directly and immediately between it and plaintiff Company and for the use and benefit of plaintiff Company.

Third. Plaintiff denies that the provisions of the policy, set out on pages 5 and 6 of said answer, have any application to plaintiff's rights under said policy, but on the contrary, avers that the express provisions of the mortgagee clause attached to the policy upon which this suit is brought prevents defendant Company from taking advantage of the provisions of the policy of insurance, as set out.

Plaintiff furthermore denies that at the time said policy was made, executed, issued and delivered the said John R. Gordon was not the unconditional and sole owner of the property insured subject only to the deed of trust in the complaint in this action set out, and denies that at the time said policy was issued said Gordon had sold, transferred and conveyed his right, title and interest in said property to the Mesa Hotel & Improvement Company.

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Fourth. Plaintiff denies, as is alleged on page 6 of said answer, that the policy upon which this suit was brought was issued at the sole instance and request of John R. Gordon, but on the contrary alleges that said policy was issued in pursuance of a direct contract between plaintiff and defendant Company. That as to whether said John R. Gordon had any interest or title to said property on the 6th day of July, 1893, plaintiff will neither admit nor deny, but it alleges that said policy had been issued prior to said date, and that, moreover, as plaintiff is advised, it is immaterial whether said Gordon had

any interest in said property or not, said insurance policy having been issued to and for the protection of plaintiff Company.

Fifth. That as to the allegation in said answer, on page 7, in reference to an offer to return the premium and cancel the said policy, plaintiff alleges that such offer was not made until long after the destruction of the property, on account of which this action is brought.

Sixth. Plaintiff denies that the proofs filed by it on or about the 2nd day of November, 1893, were in any manner defective or insufficient, and furthermore denies that on or about
61 the 16th day of November, 1893, or at any other time, said proofs of loss were revoked and recalled by plaintiff and a new and amended statement furnished.

Seventh. Plaintiff furthermore denies that all facts with regard to the loss upon said policy for which suit was brought have not been ascertained and determined, as provided for by the policy in this action, and denies that there is anything wanting in that respect.

Eighth. Plaintiff admits that prior to the 14th day of June, 1893, it had sold the note of John R. Gordon, set out in the complaint in this action, as is alleged in said answer, but denies that it was not the owner of said note on the 26th day of June, 1893, and at all other times between that date and the destruction of said property; plaintiff alleges that on the contrary it had, prior to the 26th day of June, 1893, re-purchased said note and has continued the sole owner thereof ever since said time.

Ninth. Plaintiff denies, as is alleged on page 10 of said answer, that after the issuing of the policy upon which this suit is brought and up to the time of the destruction of said property insured thereunder, the hazard connected with said property was in any manner increased by means within the control and knowledge of the insured, as is alleged in said
62 answer, or by any reason whatsoever, but on the contrary, plaintiff alleges that said building was in the exact condition at the time of the fire and at all times between the issuing of said policy of insurance and the time of the fire, that it was in when said policy was issued, and that said building was unfinished and incomplete and work had stopped upon the same long prior to the issuing of said policy,—of all of which facts defendant Company had full notice and knowledge at the time it issued its policy, as aforesaid; and plaintiff furthermore alleges that said building remained in that condition with the express agreement of said defendant Company.

Tenth. Plaintiff denies that it at any time had notice or knowledge of any increase of hazard connected with said property between the time when the policy of insurance aforesaid was issued and the time said property was destroyed by fire. Plaintiff furthermore denies that it was ever informed that it would be necessary for the continuance of said policy to provide a watchman upon said premises, and denies that the employment or continuance of a watchman was ever at any time made a condition precedent or subsequent with reference to said policy or the liability of defendant Company thereunder.

Eleventh. As to whether, on the 23rd day of July, 1893, John R. Gordon sold, transferred and conveyed to the Mesa
63 Hotel & Improvement Company his right, title and interest in the property insured under the policy in this action, this plaintiff will neither admit nor deny, but it alleges that if such a transfer was made it was totally without the consent or knowledge of plaintiff, and neither it nor M. D. Thatcher, its Trustee, had any notice or knowledge of such transfer until after the property insured had been destroyed by fire. And plaintiff Company furthermore alleges that neither it nor M. D. Thatcher, Trustee, knew that there was any such company as the Mesa Hotel & Improvement Company in existence.

Plaintiff furthermore alleges that the policy upon which this suit was brought was issued prior to the third day of July, 1893, and under the mortgage clause attached thereto this plaintiff cannot be in any wise affected by the acts of the said John R. Gordon.

Twelfth. Plaintiff denies that either it or the said M. D. Thatcher, Trustee, either directly or indirectly, ever had any notice of the alleged sale and transfer by the said John R. Gordon of the property insured, and plaintiff denies that either it or the said M. D. Thatcher ever failed to carry out and perform the obligations contained in said policy of insurance, upon which this suit is brought.

And as a further and special replication to that portion of said answer which sets up and alleges that at the time the policy of insurance upon which this suit is brought, was
64 issued, the title to the property insured was not in the said John R. Gordon, plaintiff alleges as follows, to-wit:

That on or about the 6th day of July, 1892, John R. Gordon, being the owner of the property set out in the complaint in this action, and having commenced the construction of a hotel building, as set out in the complaint in this action, applied to defendant Company through its agents in the City of Pueblo

for a policy or agreement of insurance in the form of what is commonly and ordinarily known as a "builder's risk" to the amount of ten thousand dollars ($10,000) upon said hotel building in course of construction. And thereupon the defendant Company did covenant and agree to make insurance as applied for, it being understood and agreed that said risk was to run until said building should be completed, upon the payment to defendant Company of its premium and the performance of such other conditions as are fully set out in a copy of the policy of insurance, which is filed with the original complaint in this action and to which reference is hereby made. And thereupon and on the payment to defendant Company of the sum of one hundred and five dollars ($105) premium by the said John R. Gordon, said Company did, on or about the 6th day of July, 1892, by its agents thereunto duly authorized, execute, issue and deliver to John R. Gordon its certain insurance policy or agreement numbered 1801, in words and figures fully set out in Exhibit "A" with the original complaint in this action and on file herein, except that the mortgagee clause attached to said Exhibit "A" and marked Exhibit "B" was not attached to said policy as originally issued, but was attached thereto at a subsequent date, as is hereinafter more fully set forth.

65

That after said John R. Gordon had obtained from plaintiff corporation a loan of fifty thousand dollars ($50,000) on or about the 12th of December, 1892, as is set out in the original bill of complaint herein, and after the said John R. Gordon had executed his certain promissory note, as is set out in the complaint herein and for the purpose of securing further the payment of said note, the said John R. Gordon did cause and direct a contract or agreement ordinarily and commonly called a mortgagee clause or agreement to be entered into by defendant Company, by and through its duly authorized agents, on or about the 14th day of December, 1892, and did furthermore upon said date, cause and direct said mortgagee clause to be attached to said policy of insurance, under and by which said mortgagee clause or agreement the loss, if any, upon said building in course of construction, was made payable to plaintiff Company or its assigns,—which said mortgagee clause or agreement was fully set out in Exhibit "B" filed with the original bill of complaint in this action and herein referred to.

That after said mortgagee clause or agreement had been executed and attached to said policy of insurance, both the original policy of insurance and the mortgagee clause thereto attached as aforesaid, were duly delivered to plaintiff Company; that on or about the 5th day of January,

66

1893, the time limited by the original policy of insurance having expired, defendant Company did in pursuance of the covenants and agreement aforesaid between it and the said John R. Gordon and plaintiff Company, renew and extend the builder's risk and agreement of insurance, as hereinbefore set out, until the 6th day of June, 1893, for and in consideration of the sum of $105, to it in hand paid, which said renewal and extension was especially for the benefit and protection of plaintiff Company and its assignees, with the same intent and purpose as it was protected under the original policy of insurance and for the express purpose of insuring the interests of plaintiff Company and its assigns in the building on said property as aforesaid; and defendant Company in evidence of the renewal of such insurance did then and there and on, to-wit, the 5th day of January, 1893, execute, issue and deliver to plaintiff Company its renewal policy of insurance numbered 1934, identical in all respects with Exhibit A, filed as part of the complaint in this action, except as to the number of the policy, the recitation that the clauses attached thereto were attached to and made a part of Policy No. 1934, and the time for which said renewal policy extended such insurance, which was to the 6th
67 day of July, 1893; that attached to said renewal policy and executed and delivered contemporaneously therewith was a mortgagee clause or agreement, making the loss, if any, under said renewal policy, payable to The International Trust Company and its assigns, and which said mortgagee clause or agreement attached to said policy was identical in all respects with the mortgagee clause attached to Exhibit A, filed with the original complaint herein, except as to the date of the same and the recital of the policy of which it formed a part.

Plaintiff further alleges that prior to the 26th day of January, 1893, the loan of the said John R. Gordon being due and unpaid, plaintiff Company opened negotiations directly with the Insurance Company of North America for the renewal and extension of its agreement of insurance, as aforesaid, and defendant Company by and through its agents, expressly covenanted and agreed with plaintiff Company to renew and extend its agreement of insurance to the 6th day of January, 1894, as is fully set out in the complaint in this action, which said extension was to be for the especial benefit and protection of plaintiff Company and its assigns.

Plaintiff furthermore alleges that having made said agreement, defendant Company did actually, on the 26th day of June, 1893, extend and renew its agreement of insurance hereinbefore set out, as has been alleged in the complaint in this action.

68 Plaintiff alleges and charges the fact to be, that the contract of insurance between defendant Company and the said John R. Gordon was one continuous contract dating from the 6th day of July, 1892 to the time of the destruction of the property insured, and that the contract of insurance between plaintiff Company and defendant Company was one continuous contract from the 14th day of December, 1892, up to the time when said property was destroyed, and that the various and several policies of insurance issued as hereinbefore set out, were simply evidences of said contract and of the liability of defendant Company.

Plaintiff alleges and charges the fact to be, that from the 14th day of December, 1893, up to the time when the property so insured was destroyed by fire, it was entitled to protection under the mortgage clause attached to the policies of insurance as aforesaid and that under and by virtue of the provisions of said mortgagee clauses, no act of the said John R. Gordon, whether in the way of transfer or assignment of said property or otherwise, could in any wise impair the obligation of defendant Company to this plaintiff in case of loss by fire.

And now having fully replied to the answer of defendant Company, plaintiff prays for judgment according to the prayer of its original complaint.

PATTISON, EDSALL & HOBSON,
Counsel for plaintiff.

A. C. CAMPBELL, of Counsel.

* * * * * * *

70 In the Circuit Court of the United States within and for the District of Colorado.

STIPULATION.

The International Trust Company, Plaintiff,

vs.

The Insurance Company of North America, Defendant.

It is hereby stipulated and agreed, By the parties hereto, that this cause shall be tried by the Court without a jury, a trial by jury being hereby waived.

A. E. PATTISON,
A. C. CAMPBELL,
Attorneys for Plaintiff.

71 SYLVESTER G. WILLIAMS,
Attorney for Defendant.

(Indorsed) No. 3060. In the U. S. Circuit Court. The International Trust Co. Plaintiff vs. The Insurance Company of North America, Defendant. Stipulation Waiving Jury. Filed Jan. 7, 1895. Robert Bailey, Clerk U. S. Circuit Court. Pattison, Edsall & Hobson, Attorneys for Plaintiff, 711-714 Ernest-Cranmer Building, Denver, Colo.

* * * * * * *

86 MONEY DEMAND.

Tuesday March 19th A. D. 1895.

The International Trust Company

3060 vs.

The Insurance Company of North America.

On this 19th day of March A. D. 1895, the same being one of the regular juridical days of the November term A. D. 1894, of this Court, there being present the Honorable John A. Riner, District Judge of the District of Wyoming, assigned to the District of Colorado.

It is considered by the Court that the plaintiff do have and recover of and from the defendant, Ten Thousand nine hundred sixty eight dollars and eighty eight cents ($10,968.88) its damages by occasion of the premises in its complaint mentioned, in form aforesaid assessed and its costs by it in this behalf laid out and expended to be taxed and have execution therefor.

* * * * * * *

90 United States of America,
District of Colorado.—ss

In the Circuit Court of the United States, within and for said District.

The International Trust Company, Complainant.

vs.

The Insurance Company of North America, Defendant.

APPEARANCES.

For Complaint, A. C. Campbell, Esq.

For Defendant, Sylvester G. Williams, Esq. and Wells, Taylor & Taylor.

91 BILL OF EXCEPTIONS.

Be it remembered, that on this 12th day of March, A. 1895, the same being one of the regular juridical days of

the November A. D. 1894 Term of said Court, the said cause came on for trial before the Court, Hon. John A. Riner presiding, without a jury, a jury having been by stipulation in writing of the respective parties expressly waived: and thereupon the plaintiff to sustain the issues on its behalf gave in evidence as follows, that is to say:

Henry W. Hobson, a witness produced, sworn and examined on behalf of plaintiff, testified as follows:

Direct Examination

By A. C. Campbell, Esq.

Q. Mr. Hobson, state your name, place of residence and occupation.

A. My name is Henry W. Hobson——

Defendants object to the giving of any testimony in this cause, because the petition does not state facts sufficient to constitute a cause of action. Objection overruled. To which ruling the defendants duly excepted.

Witness:—I reside in Denver; my business is that of attorney at law.

Q. What connection, if any, have you with the plaintiff in this case, the International Trust Company?

A. I am the vice-president, and my firm has always been counsel for the Trust Company I have been either first or second vice-president of the Company ever since its organization in 1892.

Q. Are you acquainted with one John R. Gordon?

A I am.

92 Q. Who owned the property in Pueblo destroyed in October, 1892?

A. I am.

Q. Now, you can state Mr. Hobson, whether or not in December, 1892, John R. Gordon negotiated a loan with The International Trust Company and if so, state the date and the amount, and what securities were given for that loan.

A. Mr. Gordon, in the early part of December, 1892, applied orally to the Trust Company, and applied to me personally; I at that time as vice-president and having great familiarity with the Trust Company's business was giving a good deal of attention to the executive business of the company; and after some negotiations he made a written application, dated the 8th day of December, 1892, for a loan of $50,000; and I have the application here.

Plaintiff offers said application in evidence and the same is received and marked Exhibit 1.

Witness: The application was for $50,000. Shall I read the application?

The Court: It is not necessary to read that in evidence.

Witness: The only material part of it is that it was to be secured by deed of trust upon certain lots in Pueblo, 11 to 16, block 126, inclusive, and an agreement to keep $60,000 insurance on the property. I immediately sent Mr. Gibson, our assistant secretary to Pueblo, to investigate the loan, and after the report was made it was brought before the executive committee, and that application that was made to me for a loan was approved; the approval, I think, was on the 12th of De-
93 cember; in fact I am quite sure the 12th of December, 1892.

Q. Now when was the loan made?

A. We accepted the loan on the 12th day of December, 1892, and all of the papers were dated as of that date—the notes, deeds of trust, &c.

Q. What papers have you there as evidence of this loan?

A. After the loan was accepted the papers were prepared, and I have here the original note, dated December 12, 1892, signed by John R. Gordon; and also the original deed of trust, which was dated on the 12th day of December, and acknowledged on the 13th.

Mr. Campbell: We offer these two papers in evidence to be marked Exhibits 2 and 3.

Witness: Since the papers were executed we paid over the money to Mr. Gordon.

Q. When was the money paid over?

A. I thought I had the checks here, Mr. Campbell, but I have not. It was within a day or two after the papers were signed. There were some little preliminary matters, in the way of getting the papers signed, etc., but it was within two or three days after the 12th. We paid over the money, the entire amount less the expense of the loan, including the commission of one per cent., I believe on the loan.

Q. Now what, if anything, was said or done about keeping the property insured at the time?

A. Well, the applicant agrees that the property shall be kept insured during the period of the loan—the loan was for six months—for $60,000.

94 Q. Do you know how much insurance was on that hotel property, sir, at the time that loan was negotiated?

Defendants object because immaterial. Objection overruled. To which ruling of the court the defendant duly excepted.

Witness: No sir, I do not know what was on at the time the loan was negotiated; I know that within a very few days after the loan was made there was $60,000 insurance on it. Policies were received by us for $60,000.

Q. Now in order that we may be advised in this matter, the property you took the loan on was known as ——

A. It was known as the Mesa Hotel property. It was a hotel. It was commenced in the summer before and it was almost as much completed as it was on the date of the fire. As a matter of fact Mr. Gordon never put any of our money on the hotel, to any extent. It stood very much at the date of the loan as it did at the date of the fire.

Q. Now what was done with this loan after the deed and deed of trust and the note were delivered to your company by Mr. Gordon?

A. After we had completed the loan and got everything straightened out we offered it to the Company, the Scottish Company, a correspondent of ours known as the Investors Mortgage & Security Company, Limited—I believe that was its corporate name; and on or about December 29th we sold the loan to them and transferred the note. We were their regular agents in this country, that is, their regular correspondents. We had sold them a good many loans before that, and we have sold them a good many since. And as soon as we had sold
95 the loan we sent the note either to them directly or to their New York depositaries, Cuyler, Morgan & Company; one or the other, and all the other papers we kept, the agreement, the deed of trust, the insurance policies and all other papers relating to the loan. They have always been in our possession.

Q. What obligation was your company under, if any, to the Scottish Company, to whom you sold this note, to repay it on its becoming due?

Mr. Williams: If the court please, we object to the statement as immaterial and irrelevant, and that the note itself is the best evidence. The note is in evidence and is endorsed and shows what obligation the International Trust Company were under to the Scottish Company. It is assigned without recourse and they can not give verbal testimony with regard to it.

Mr. Campbell: If the Court please, we offer to prove by the witness that under an arrangement the International Trust Company had with the Scottish Company they were obliged to take care of any loan that they sold to the Scottish Company, on failure of the original party to the instrument to pay it on maturity.

The Court: How do you propose to do that, Mr. Campbell, in the face of their endorsement to the contrary?

Mr. Campbell: That is a custom, if your Honor please, to endorse all of their notes in that way. They did not in writing guarantee any loan.

96 Witness: Our contract was different from that; it was on a contract to buy the loan—

Mr. Campbell: We propose to show that before they made any arrangement with this company at all they obligated themselves to take up any loan and pay it in case the parties themselves did not pay it.

The Court: Well, you will have to get your contract. The objection at present will be sustained.

To which ruling of the court the plaintiff duly excepted.

Q. Now when was that note repurchased if it was repurchased, from the Scottish Company?

A. It was repurchased so far as our reacquiring the title of the note and owning it, on or about the 12th day of June, 1893. We never paid that loan, we repurchased it, and we had a contract with the Scottish Company not to pay loans, but to repurchase any loans that were not paid at maturity, if they desired us to do so. That loan has never been paid to this day.

Q. Now, you say, Mr. Hobson, that this note was transferred and sold to the Scottich Company on the 29th of December, 1892, and then on the 12th of June, 1893, you repurchased it.

A. Our title dates from that date.

Q. Now, how did you come to repurchase this loan?

A. Well, in order to explain that I will have to take the papers in the case. I have copies of them. Those were all introduced in the equity case. The way we came to repurchase this loan, Mr. Campbell, was this:

97 When we first entered into relations with the Investors' Company to whom we sold this note, we arranged with them to sell—

Defendants object.

The Court: I do not see, Mr. Campbell, that that is material.

Mr. Campbell: I am asking whether they purchased and how they came to do it on the 12th of June.

The Court: Mr. Hobson informed you in his former answer that they did it because of a contract. Now, that contract, I presume is in writing, and if it is you must get the contract.

Witness: The loan became due on the 12th day of June, and no negotiations of any kind, any correspondence, took place before May 26th. On May 26th we received a letter from Cuyler, Morgan & Company, who were the New York depositaries of all of the Investors' Company's securities.

Q. Have you that letter there?
A. I have a copy of it, not the original.

The Court: You may read your copy, and if after comparison it is found to be a true copy of the original it may be substituted.

Q. State what that letter contains from Cuyler, Morgan & Company.
A. The first letter of May 26th addressed to The International Trust Company, is as follows:

"We hold note No. 1026 signed by John R. Gordon, due June 12," for $50,000 with coupon attached for $1,750. Please inform us if you will send cheque to us to take up this note, or if we shall forward same to you for collection. Your prompt reply will oblige. Yours very truly, per pro Cuyler, Morgan & Co.
A. C. Vaughan."

98 Q. (The Court) What is the date of that?
A. That is on the 26th of May, 1893. On the 29th of May, 1893—the original letter is in the papers—the following reply was sent by The International Trust Company, to Cuyler, Morgan & Company:

"Your two letters of the 26th instant received. The Nichols coupon for $350 due 14th May was duly paid, and we sent you draft on State Trust Company for the same on the 15th of May. I hope you received it all right. I telegraphed you to this effect this morning. The Gordon note for $50,000 with coupon attached for $1,750 due 12th of June you will kindly forward to this office for collection; do not endorse this bill and coupon to our order, but simply forward them as they are, and oblige. Yours very truly, John F. Bell, Secretary."

Upon the 2nd of June, 1893, Cuyler, Morgan & Company wrote us the following letter:

"We are in receipt of your favor of 29th ulto., contents of which we have noted, and we beg to advise you that we are to-day forwarding to your good selves, for collection, under registered cover and seal of our notary, the Gordon note for $50,000 with coupon for $1,750 due June 12th attached. Yours very truly, per pro Cuyler, Morgan & Co. D. P. Kingsford."

On the same day they sent us a formal printed letter simply enclosing the note. On June 17th Mr. Bell acknowledged receipt of the letter as follows:

"This is to acknowledge receipt of your valued favor of the 2nd instant enclosing the note of John R. Gordon for $50,000 and attached coupon for $1,750 for collection as stated."

On the 12th of June we received the following telegram from Cuyler, Morgan & Company—this telegram I remember very distinctly was received very early in the morning, and I saw it personally:

"Is Gordon note paid Wire. Cuyler Morgan & Co."

99 On the 12th day of June we wrote this letter to Cuyler, Morgan & Company:

"In regard to the loan of John R. Gordon held by the Investors Mortgage Security Company, Limited, for $50,000, we beg leave to advise you that as we were authorized to reinvest the money we have arranged to extend the the loan six months, and herewith enclose you New York draft No. 258 on the State Trust Company for $1750 interest to date. Be kind enough to acknowledge receipt."

We also wrote them on same date as follows:

"We have just sent you draft for interest on the loan of Gordon on account of the Investors Mortgage & Security Company, and received your telegram asking if the Gordon note was paid to wire. We judge from that that there was some expectation of the note being paid and remittance made for other purposes, and we consequently wired you to the effect that we were to reinvest the money, and as no instructions to the contrary had been received we had arranged six months extension of the loan, and we have wired the Investors Company that if they desired it, we will take up the loan ourselves as soon as possible, probably in a few weeks. At the time the money was placed in our hands, it was distinctly understood that we should reinvest it at the expiration of the Gordon loan, and as Mr. Gordon desired an extension and we had no contrary instructions we felt authorized to agree to the same. We however never wish our correspondents to be dissatisfied and if the Investors Company wishes the money, we will take the loan off their hands. We would do so immediately but for the fact that money is very tight out here and we have arranged to use all the money we can spare for the next few weeks. It may be that within the next ten days we will take up the loan and remit to you. Yours Very truly, John F. Bell, Secretary."

We sent this telegram also to Cuyler, Morgan & Company on the same day:

"It was understood we were to reinvest money. Not instructed to contrary consequently arranged six months extension loan. Interest remitted to-day. Wired Investors
100 Company if they desired we will take loan ourselves within short while."

This letter was sent to Guild & Shepherd on the same day:

"This morning we received a message from Messrs. Cuyler, Morgan & Company asking if the Gordon note had been paid and to wire answer. In reply we sent telegram, copy of which we herewith enclose you. At the same time we wired you, copy of telegram herewith enclosed. You will remember that at the time this loan was made we agreed to reinvest the money for you and it was our distinct understanding that you desired us to do so. We have heretofore received no instructions to the contrary and we naturally presume that you wish your money to remain reinvested, and as Mr. Gordon has been unable on account of the extreme tightness of the money market and the difficulty in getting money, to arrange a large loan which he had been negotiating, he applied for an extension and we had arranged to extend his loan six months. Although as stated herewith we understood that we were authorized to reinvest this money, which in my opinion would cover an extension of this loan, but we wish you to be entirely satisfied in regard to it and I am therefore authorized by our executive committee to say that we will just as soon as possible, take up the Gordon loan ourselves if you desire it and remit the money to Cuyler, Morgan & Company to your credit. Please wire us upon receipt of this letter what your wishes are in the premises and we will arrange to conform to them. Yours very truly, John F. Bell, Secretary. We remit to Cuyler, Morgan & Co. to-day $1750 interest to date on above loan."

That was paid by ourselves and not by Mr. Gordon.

Q. (The Court) What was the date of that?
A. On the 12th of June. On the same day we sent to Guild and Shepherd—their cable address being "Equitable, Edinburg"—the following:

"Cuyler wires about payment Gordon note. Presuming we to reinvest arranged six months extension. Can take loan ourselves soon if desired. Wait our letter of this date."

101 After that correspondence that I have just read had been written and sent, by a later mail on the same day we

had the following letter from Guild & Shepherd, and the correspondence that I have read does not refer to this letter which I will read in a moment, at all. It was received by a later mail after we had sent the telegram. This is dated Edinburg, 31st May, 1893: "We duly received your letter of 12th inst. in which you submitted to us two loans of $4,000 and $40,000 respectively." Those were other loans. And then follows another matter about those loans, until we get to the last clause: "We are so short of funds at present, that on the repayment of the Pueblo loan on the 12th prox. we shall require the money at our bankers in New York. Yours truly, Guild & Shepherd. P. S. When the Pueblo loan has been repaid and remitted to New York, you might kindly cable the word Pueblo."

After the receipt of this letter, on the next day, June 13th—this letter was received on the 12th of June—we say as follows, to Guild & Shepherd:

"Referring to our letter and telegram of yesterday, we beg leave to say that we are just in receipt of your favor of May 31st in which you say as follows, to-wit: 'We are so short of funds at present that on the repayment of the Pueblo loan on the 12th proximo we shall require the money at our bankers in New York.' I greatly regret that we did not receive such instructions a little earlier as we could have arranged to let you have the money promptly on the 12th, but as you will remember when we made the Gordon loan it was understood that we were to reinvest this money and if we had not arranged to extend the loan to Mr. Gordon we should, in the absence of instructions to the contrary, have arranged for reinvestment so that you would not lose any interest. Confirming my letter of yesterday,
102 the best that I can do under the circumstances is to say that we will ourselves just as soon as possible, if you desire it, take up the loan and carry it ourselves. We would do so immediately but for the fact that times have been very hard here and we have been compelled to renew loans and to carry our customers for considerable amount which makes us pretty short of funds at present, but we are expecting some large loans to be paid between now and the first of July. You need not have any anxiety about this loan or security, for whilst we do not legally guarantee any loans, we always stand back of our correspondents and protect them, and at any time we would rather take up a loan than to have them dissatisfied. To be perfectly frank it would be quite inconvenient to us to take up this loan at present, as we need all of our money, and if entirely agreeable to you we would like to have the privilege of taking it up at any time within sixty days from its maturity, viz, at any time before August 12th. We remitted yesterday to Messrs. Cuyler, Morgan & Co. $1750 the interest upon this

loan for the past six months. Notwithstanding the hard times the general condition in this state is good, and I think Denver may boast of the best condition of any city of its size in the United States. The fall in our silver was largely discounted, and we have no fear here of anything more than a dullness and depression for a time. Awaiting your further advices and wishes, I am yours very truly, John F. Bell, Sec'y."

This letter was received, as I say, after the other letters had been answered. When the other letter [were] received and this letter was answered I immediately conferred with the executive committee of the Trust Company,—and, in fact, before this letter was received—and was authorized by the executive committee to repurchase the loan in pursuance of the contract which I have mentioned, and I had even made arrangements to borrow the money of the First National Bank and repurchase the loan from Cuyler, Morgan & Company, although we did not care to do it within 60 days if we could get the time.

103 Q. Cuyler, Morgan & Company were the agents of this Company?

A. They were intermediate agents. At the same time, on the 12th of June, I wrote a letter to Mr. Gordon—it is in the other papers—in which I notified Mr. Gordon that we had been called upon to take up the loan and had concluded to do so, and notified him that we were the owners of the loan and from that time we would deal with him.

Q. What was the date of that letter?

A. That letter was dated, I think, on June 12th, but I cannot remember.

Defendants object to the letter written to Mr. Gordon, as not in any way relating to the repurchase of this loan, and because not material. Furthermore, that the letter itself should be produced. Objection overruled. To which ruling of the Court the defendants excepted.

A. That constitutes all of the letters and telegrams which we sent to Cuyler, Morgan & Company and to Guild & Shepherd on the 12th, and as I stated before, at that time we paid the interest ourselves promptly and remitted to them.

Q. I believe that you stated that the interest was paid on the 12th of June?

A. Yes sir, it was remitted to Cuyler, Morgan & Company on the 12th of June. We were waiting advices from them as to whether they would give us 60 days extension to pay the balance of the loan, the principal of the $50,000. From that time the loan was our loan and we paid interest from the 12th of June to the Investors Company, when we finally took it up.

and we paid interest up to September, and then we
104 arranged with them for a renewal of a year on our own note, gave them our own note in September, but took it up before the year was up, but paid the interest ourselves on the loan. On the 15th of June, Morgan & Company wrote us the following letter:

"Dear Sirs: We beg to acknowledge receipt of your two favors of 12th inst. with remittance of $1750, being interest due on Gordon $50,000 note a/c of Investors Mtge. Security Co., for which we thank you. We note the contents of your letters and are writing the Investors Co. in this connection.

We remain yours very truly,

CUYLER, MORGAN & CO."

On the 26th of June we have the following telegram from Guild & Shepherd:

"Have received your letter of 13th June, we will delay until 15th of September."

That telegram was in reply to our offer to take up the loan and asking them to give us 60 days in which to pay the balance over and above the interest, and their telegram was as I have read. We also received the following letter from Guild & Shepherd, dated June 14:

"We beg to confirm the following cable message which we received from you on the 13th inst. 'Cuyler wires about payment Gordon note. Presuming we to reinvest. Arranged six months extension. Can take loan ourselves soon if desired. Wait my letter of this date.' We accordingly wait your letter."

On June 26th we wrote the following letter to Messrs. Guild & Shepherd:

"We are in receipt this morning of cablegram from you as follows:" Then follows the telegram I have just read. "This
105 is satisfactory to us and we will arrange to take up the loan at that time. We would do so now but as we wrote you, it would be quite an inconvenience for us in view of the hard times ——."

Q. (Mr. Williams) Is that June 26th?
A. June 26th, yes sir.

"——We have the note here, and I would suggest that as we are to take it up, that we hold it for the present, and send to you to be endorsed over us. The note now stands in your name, consequently we will wish it endorsed to us when we take it up. Thanking you for your courtesy, and regretting that we

should have misunderstood your wishes in this matter, I am, yours truly, John F. Bell, Secretary."

The note had been sent to Cuyler Morgan & Company, as I remember, before its maturity. On the 28th of June Guild & Shepherd wrote us as follows:

"Dear sir:—We were duly favored with your letters of 12th and 13th inst. and had also your cable of the former date. Your letters were submitted to the directors at their board meeting on the 26th inst. and they ask us to say that they regret exceedingly that their commitments will necessitate their asking repayment of this loan. We regret that we did not give you earlier intimation but when you mentioned at the time you made the loan that you would be able to reinvest we did not consider that it was actually agreed between us that we were to reinvest without further communication. On this point we should perhaps have made matters more clear, and we regret that we did not do so. Our directors ask us to thank you for your kind offer to relieve them of this loan. They do not desire to inconvenience you by asking you to relieve them of it at the present time, but they would like that you should make such arrangements as would enable you to take it over from us at a date not later than than 15th September next. When you do so take it over, we shall be obliged if you will kindly place the amount with interest to that date to the credit of our account with Cuyler, Morgan & Coy. We think we already explained to you that we hope to be able to lend further in the Spring of next year, and we shall keep your claims to a portion of the amount which we then hope to be able to place, before our board."

106 That letter, together with the cablegram which I read a few minutes ago, was the first formal acceptance which we had, or rather, a formal notification that they expected us to take up the loan; and in June there was no further correspondence on this subject. We had a great deal of correspondence with Guild & Shepherd which really belonged to other matters. We had a great many letters from them, but these letters I have read constitute the complete history of the negotiation for the repurchase of the loan.

Q. You have all the letters there?

A. Our files show that we have all letters with reference to the repurchase of the loan. We have a great many other letters from Guild & Shepherd, and there may have been casual references to the Gordon loan frequently for a year or more until they were finally paid, but these letters show a complete history of the transaction. On July 21st, we wrote Messrs.

Guild & Shepherd—this is a letter to them from us on that day—as follows:

"In anticipation of the fact that we expect to take up the loan to John R. Gordon for $50,000, I send you herewith the note to be endorsed by you to us. In endorsing the same please endorse it to 'John F. Bell, Trustee,' instead of directly to the Company. You might send it back to us direct unless there is some objection, and we will hold the same and be responsible for it. We hope to be able to take up this loan as we proposed promptly on the 15th of September, but if times continue as they are now we may be compelled to ask some further indulgence from your company, but will be prepared to give you ample security if you desire it. I do not say this in anticipation of the fact that we shall do so, but simply because in the present condition of affairs here it is absolutely impossible to collect money. We are carrying our 107 people and pushing them would simply mean ruin to them and greater delay in getting our money. We have to-day much over-due paper which we are carrying for people and there is no positive certainty when we will be able to collect anything again. We have had as you will probably see by the papers quite a crash in our banking circles here, due almost entirely to the fact that people lost their heads and went wild."

Then follows a good deal of discussion as to the condition of affairs, that you may not want. On the 5th of August, Guild & Shepherd wrote us the following letter: "Dear Sir:—We are in receipt of your letter of the 21st ulto. enclosing note for $50,000 by John R. Gordon to be endorsed by this Company to you. The note will be endorsed at the next meeting of the directors to be held on Wednesday the 9th inst. and thereafter returned to you." On the 9th of August Guild & Shepherd wrote us the following letter:

"Dear Sir: The Directors at their meeting to-day authorized the indorsation of this note to you as trustee, and we now send same herewith so endorsed. Kindly acknowledge receipt of same and hold it for collection."

That is addressed to John F. Bell, Secretary.

"We trust that it will not put you- company to any great inconvenience to make payment of the same on the 15th of next month. We think that we already explained to you that our reason for asking you to relieve us of this loan was that we close our books for the year about then and wish the payment for other engagements which we have to meet before the balance. We have to acknowledge receipt of your letter of the 15th ult.

enclosing statement of remittances to Messrs. Cuyler Morgan & Co. which we have examined and found correct."

Those are remittances on different loans. The balance of the letter is about other matters. On August 22nd we wrote Guild & Shepherd as follows:

108 "Your favor of the 9th inst. received along with the Gordon note for $50,000. I have also a letter from Mr. R. H. Guild, and we will be very much pleased to have him spend a few days with us next month."

September 5th Mr. Bell wrote the following letter to Guild & Shepherd.

"I am in receipt of your letter of Aug. 21st in which you state that your directors have consented to extend the Gordon loan for one year from September 15th at 9 per cent. interest, we giving our obligation for the same, and placing in the hands of your bankers in New York as security the Gordon note for $50,000 and such additional collateral as will be satisfactory to you. I must frankly admit that we are extremely averse to paying as high a rate of interest as 9 per cent. a year and I had hoped that in view of our prompt action in assuming personally this loan (although we were not legally liable for the same) that your directors would deal somewhat more liberally with us; still, we would prefer to pay 9 per cent. for a short time rather than to be forced to distress our customers in the present financial condition of the country. In view of the high rate of interest, however, we wish to have the privilege of paying at the end of any 3 months, whatever amount we may find convenient with interest to date, which will then be credited upon the note. We think we are fairly entitled to this under all the circumstances. Upon September 15th we will, if possible, make a remittance on account, and fix up the balance in the manner agreed upon."

We have the following letter of September 22nd from Guild & Shepherd:

"We have your letter of 5th inst. which was submitted to our directors at their meeting on Wednesday. They feel highly gratified at the way in which you have treated us in this loan and would have been glad had it been possible to accept 7 per cent interest. Unfortunately the crisis which has been felt so keenly by you has not been without its effect here, and the fact of our not getting payment of this loan and some other loans which we we were depending upon has forced us to sacrifice securities in our hands by realizing in the present depressed state of the market, so that, in the circumstances, they feel it

necessary to ask a higher rate of interest. They, how-
109 ever, fall in willingly with your request to have the privilege of paying at the end of any three months whatever amount you may find convenient with the interest to date which will then be credited upon the note. We note that on the 15th of this month you hope to make such a remittance to account which will meet with our views. Regretting that we are unable to accept of terms which would be more favorable, we remain, yours faithfully, Guild & Shepherd."

On September 23rd, we wrote as follows to Guild & Shepherd.

"Referring to our letter of the 21st of August in reference to the Gordon loan and to our letter of Sept. 5th in reference to the matter, I beg leave to say that we to-day send to Cuyler, Morgan & Company, a remittance of $10,000 on account, with interest on the Gordon loan from June 12th to September 12th, and our note for $40,000 payable on or before one year. As collateral for said loan we send the Gordon note and two other notes amounting to $11,000, making the collateral held for our loan $61,000. Instead of dating our loan Sept. 15th we dated it Sept. 12th on account of that being the time when the quarterly interest is due, and I herewith send you a copy of the note as sent to Cuyler, Morgan & Company."

This note I speak of was a year note. We found we could not pay $40,000 on the 15th of September, and had arranged with them to give us another year on our giving our own note as collateral, and that was the loan referred to.

"We arranged this matter with Mr. R. H. Guild, who was recently in this city"—

Mr. Guild was over here personally; he is a member of the firm of Guild & Shepherd—

"—and he was satisfied with the additional collateral which we have sent on. You will note further by the copy of note sent you, that according to our letter, we reserve the right to pay at the end of any three months, any portion of this loan.
On account of pressure of business we are not able to send
110 you to-day as complete a statement of this matter and of other matters as you desire by your letter of Sept. 13th, which I received this morning, but will do so by the next mail. Trusting that this matter is arranged satisfactorily to you I am, very truly yours, John F. Bell, Secretary."

I may say here that in the early part of September, I think, if I am correct—it was about the 10th—Mr. Guild, of Guild & Shepherd, was on a tour of inspection in this country, and I personallly arranged with him—explained to him the condi-

tion of affairs and the fact that we were pretty hard up,—to make us a loan for a year of $40,000, upon our paying $10,000; and he examined the collateral and looked at the property that collateral was based upon, and agreed to it, and it was in pursuance of that, and we paid this interest to September 12th and gave a note at 12 months, which note was paid shortly afterwards. It did not run for 12 months, but I think, until January, 1894, when we took it up and paid the balance of $40,000 with interest.

Q. Have you read all of the correspondence?

A. No, there is another letter. Here it is: John F. Bell, Secretary, received the following letter dated Sept. 27th, from Guild & Shepherd:

"We beg to confirm the following cable which we received from you on the 24th inst. (Translation) Have remitted to-day to Cuyler, Morgan & Coy. 10,000 on account of the Gordon loan.' On 8th August we sent you out the Gordon note endorsed to you as trustee. We presume you have endorsed on the note the $10,000 paid to account. The interest on this sum and the balance to be paid will be calculated afterwards and we presume you do not wish us to take off this sum the interest to date, but as to this perhaps you might write us. We shall be glad to hear from you. Yours faithfully, Guild & Shepherd, Secretaries. We shall also be glad to hear from you as
111 to the lodging of the proposed securities with Messrs. Cuyler, Morgan & Coy, New York."

This note as originally sent to the Investors Company was endorsed simply,—the first endorsement by the International Trust Company. It was returned to us by Cuyler, Morgan & Company without any further endorsement on it at all. In the month of August it was sent over to Guild & Shepherd and was returned by them endorsed, "Pay John F. Bell, Trustee, for Investors Mortgage Security Company, Limited, Guild & Shepherd, Secretaries." After the note was received back it was then endorsed by Mr. Bell, "Pay the International Trust Company, or order, without recourse. John F. Bell, Trustee." And that was delivered in the latter part of August or first part of September. We have on our loan book some entries which I would like to read—

Q. Have you an account showing the transaction with relation to this note?

A. Yes sir.

Q. Have you got that book here?

A. No sir, I sent Mr. Gibson for it a short time ago, and I would like to have that book, because I do not remember the entries upon it.

The Court: Proceed with other matters and give the book to them.

Q. Now, Mr. Hobson, how much if any money did Mr. Gordon pay on this loan prior to June 12, 1893?
A. Not a dollar sir.
Q. You may state what he paid upon it since that time?
A. Well some time afterwards after we had repurchased the loan from Cuyler, Morgan & Company, we pressed him a good deal and he paid one installment of interest
112 $1750.
Q. When was that?
A. From my recollection of it, without the book, is that it was the latter part of June, 1893; some while after the 12th. I cannot fix the date definitely without the book. I have got the book here now, Mr. Campbell.
Q. State Mr. Hobson, if you have with you now the book of The Trust Company showing the transaction with relation to the note about which you have been testifying?
A. Yes sir.
Q. State what that book is?
A. The book is our record of real estate loans, the book in which we carry our own loans as well as loans of our customers.

Defendants object to witness testifying from said book until it has been offered in evidence and they have had an opportunity to examine it and to ask questions about it.

Mr. Campbell: We now offer in evidence so much of this book as shows the transaction with relation to this $50,000, the Gordon note. Marked Exs. "A" and "B."

The Court: You can use it and have your secretaries make copies of the entries which you offer and furnish them to the stenographer. The book is not a public record. The counsel will be permitted to examine those entries and those only.

Q. Now just state what that entry shows?
A. The original entry—

Defendants object because immaterial. Objection overruled. To which ruling of the Court the defendant duly excepted.

113 A. The original entry on this book is on page 42, and sets out the Gordon loan, the amount and the various items with regard to the loan, which I suppose it is not necessary to read. It sets out the loan as $50,000, interest at 7 per cent., payable semi-annually. Due, June 12, 1893. Then follows a description of the real estate. When the loan was sold

to the Investors Company there was an entry in red ink, "Transferred to page 375, Loans for Account." On page 375 we carry loans for account in the back part of our book; our own loans in the front part. We entered the name—

Defendants object for the same reasons before mentioned.

Objection overruled. To which ruling of the court the defendants duly excepted.

A. On page 375 is the entry "John R. Gordon Loan. No. 1026." We give the trust deed by Gordon, interest 7 per cent. per annum. Loan, $50,000, account Investors Mortgage Security Company; interest payable semi-annually, $1750. Due June 12, 1893. Insurance $60,000. Then follows the description of the lots. Then dated December 12, 1892, is the date of the loan. Those were the original entries upon the book. When this $10,000 was remitted to the Investors Company in September, 1893, I made a personal examination and gave personal instructions about it. I will not say it was the same day, but either the day before or the same day, and I found that Mr. Bell, the secretary, instead of transferring the loan back to our personal account had been carrying it along here in this account on this page, and he had made some additional
114 entries. At the top of the page is this: "10 per cent. from June 12, 1893," which meant that we had notified Gordon that he would have to pay us 10 per cent from that date. We did not pay 10 per cent to the Investors Company. We paid 7 per cent to the Investors Company up to Sept. 12, and 9 per cent. after that. He also erases the insurance "$60,000" and put in over it "$50,000," which referred to the fact that I had consented to a reduction of insurance from $60,000 to $50,000. He then had made no entries here and I wrote in pencil—the pencil marks are still in here, "Interest to date;" interest to date based on our repurchase. "The first date is June 12th. Interest $1750. Sept. 12, interest to date based under our repurchase, $875," making $2625. Then "1893. June 12, By cash, $1750. Sept. 15, interest to date based under repurchase, $2625." I wrote those notes myself.

Q. Were they made before or after the fire?

A. They were made before the fire. I used my pencil and the marks are still there and the ink is written over them. The pencil marks are in my own handwriting, and were put there to instruct Mr. Bell how to make the entries. Then follows the following pencil marks by me: "Repurchased from Investors Mortgage Security Company, June 12, 1893, and carried back to page 42, Loan 541." Then written in ink by Mr. Bell is the exact words over my pencil notes. I ascertained that this had been done this way by inadvertence, and I at once instructed

him it was wrong, that it had been carried on our books as a loan, and I put these notes to carry it back.

115 Q. Those were transferred were they?

A. It was transferred back in the following words: "Repurchased from Investors Mortgage Security Company, June 12, 1893" Following that are a lot of interest charges, insurance, debit and credit, which we had got from the companies mentioned. I cannot say the date Mr. Campbell.

Q. In other words, those books were not filled up after the fire—

A. I will say this Mr. Campbell, that it is my recollection that just as soon as I wrote these notes—Mr. Bell and I were standing at the desk together, and I began there to examine the books and I told him it was wrong to be carrying the loan this way. I told him to carry it back, and took my pencil and scribbled it, and my recollection is that Mr. Bell took up a pen immediately and wrote these entries, carrying it back to these loans.

Q. Have you stated everything with reference to the accounts?

A. Yes sir, everything in this book shows our accounts.

Q. Now is that all, or have you got any other books in your office containing the history of this account?

A. No sir, that is all; this loan book and the correspondence which I have read.

Q. Now we have in evidence Mr. Hobson—all the letters and correspondence and the accounts in relation to the loan and the repurchase?

A. That is the complete history of the loan and the repurchase, as shown by the records of our Company.

Q. Now prior to the 12th of June state whether or not there was a meeting of your executive committee with reference to this note.

116 A. Yes sir; I say a meeting—possibly that is an incorrect term. We frequently determined matters informally, and there had been two—first on the 9th of June, when Mr. Gordon first made a formal application for a renewal, although I had had some intimation that he would want a renewal. At the first time he made the application and he was present, and at that time it was determined that under all the circumstances we repurchase the loan from the Investors Company. On the 12th or 13th of June I again consulted the members of the executive committee and I was authorized by them to repurchase the loan and made arrangements to borrow the money from The First National Bank, and we actually paid $1750 interest.

Q. Now, coming back, Mr. Hobson, to the date this loan was made, you say it was on the 12th of December, 1892. Now

you can state what policies, if any, you received from The North America Company, on the Mesa Hotel property.

Defendants object because immaterial. Objection overruled.

To which ruling of the Court the defendants duly excepted.

A. We received a policy of insurance for $10,000 from Mr. Gordon. He sent it to us. It expired on January 6, 1893, with a mortgage clause attached for our protection.

Q. Now did you receive any other policies on or about that time?

A. Yes sir, we received policies aggregating $60,000 in amount—one from the Alliance Company and one from the Norwich Union Company.

The Court: What was the date of the first policy that
117 you received from the North America? What was the date of its expiration?

A. It expired on January 6, 1893.

Defendants object because immaterial.

The Court: He has answered it now. I do not know whether it will be material or not. I will see about that.

To which ruling of the Court the defendants duly excepted.

Q. What is the date of the first policy?

A. The policy was countersigned on the 6th day of July, 1892, and expired on the 6th day of January, 1893.

Q. You say they had a mortgage clause attached?

A. Yes sir, here is the original policy.

Q. From whom did you receive that policy?

A. Mr. Gordon sent it to us, and, as I remember, on the 14th of December, or the 15th of December.

Q. Who were the agents in Pueblo at that time of the North America Company?

A. The policy is countersigned by Benson, Kirtland & Rice, Agents. This was the Pueblo firm that I know.

Q. Now just give the date of the next policy that you received from the North America Company?

A. The next policy we received in the early part of March, 1893, and after some correspondence we received that directly from Benson, Kirtland & Rice, or Benson & Kirtland.

Defendants make the same objection as before.

The Court: They are not offered.

Mr. Williams: We mean as to the testimony in regard to them.

118 Objection overruled. To which ruling of the court the defendants duly excepted.

A. Their letter transmitting the policy is in the files of the equity case. That policy was countersigned on the 6th of January, 1893, and runs from the 6th of January, 1893, to the 6th of July, 1893.

Q. You say you got them directly from Benson, Kirtland & Company?

A. Yes sir.

Q. I will ask you now, Mr. Hobson, whether or not you had any correspondence with them about this policy prior to their writing you in relation to it?

A. Yes sir.

Q. Where is that correspondence?

A. It has been introduced in evidence, the originals in the equity case.

Mr. Campbell: We will offer them when they come, your Honor.

Q. Now what is the date of the next policy of the North America Company?

A. The next policy is countersigned the 26th of June, 1893, by Benson & Kirtland, and it runs from the 6th day of July, 1893, by its terms, to the 6th day of January, 1894.

Q. (Mr. Williams) That is the policy in suit?

A. Yes sir.

Q. Now you may state whether or not the amount in all these policies is the same?

A. Yes sir—$10,000. That is all in the North America Company.

Q. And who are they all made payable to?

A. The policies run to John R. Gordon, in the body of them, and there there is a mortgage clause by which they make the loss payable to The International Trust Company, Denver, Colorado, and its assigns.

119 Mr. Campbell: Now, if your Honor please, we offer these three policies in evidence.

Defendant object- because immaterial.

The Court: Examine your policies and we will consider your objections at two o'clock.

Recess until 2 o'clock.

Mr. Williams: I believe your Honor is to hear some objections on these policies.

The Court: My understanding of your objection is, Mr. Williams, that the renewals are separate contracts, and the two first policies therefore are not material here.

Mr. Williams: And are merged in the contract sued on.

The Court: I think I will let them be admitted for the present. I do not say that I will consider them in.

Mr. Williams: I have some authorities on the subject if the point can be argued in the general argument of the case, as to their effect.

The Court: Yes, I will hear them.

To which ruling of the Court the defendants duly excepted.

Q. Calling your attention to this policy, Mr. Hobson, sued upon, that has been introduced in evidence, I will ask you when you received it, or when your company received it.

A. That I cannot answer, Mr. Campbell. The facts about it are simply these: that when the policy expired we
120 wrote asking for renewal, and there was considerable correspondence between Mr. Bell and the firm of Benson & Kirtland during July upon the subject of this policy. In the first part of August, when I first learned of this correspondence, which became somewhat acrimonious, I ordered a strict search to be made, and it was found that this policy had been misplaced, and was found in a pigeon-hole in the safe in the office, and how long it had been there or how it got to the office I do not know. There is no record in the office showing when it was received, except the mere words on it "For Acct No. 1026." That is the number of our loan; and that was the fact and whether it was received during July, or June, or when, I cannot say, but it was in our office early in August.

Q. You may state whether or not you have had any correspondence with Benson, Kirtland & Company in relation to this insurance in [contorversy.]

A. What do you mean?

Q. Received any letter from them in relation to that?

A. Do you mean to say one policy or those?

Q. In relation to this policy and other insurance?

A. Yes sir.

Q. Where are those letters?

A. The letters, the originals, were introduced in evidence in the chancery case, and I suppose are here.

Q. Look over the letters in the chancery case and pick out the letters in relation to this matter.

A. I have them right here. The first letter that we ever had from Benson, Kirtland & Rice on the subject of this insurance is Exhibit 7 in the chancery case of The International Trust Company against the Norwich Union Society.

121 Mr. Campbell: For the purpose of saving time we will let the stenographer note that we offer these in evidence as we call them off.

The Court: Very well.

Witness: This is dated February 6, 1893.

Mr. Williams: We object to that method.

The Court: Make your offer Mr. Campbell, as each letter is offered.

Q. What letter is that?
A. Dated February 6, 1893, Exhibit 7 in the chancery case.

Mr. Campbell: We will offer that letter.

Q. Now state what that is?
A. This is a letter from Benson, Kirtland & Rice to the International Trust Company.

Defendants object because immaterial.

The Court: Mr. Hobson may read it.

To which ruling of the Court the defendants duly excepted.

Witness: "Gentlemen: Will you kindly send us a supply of your mortgage clauses, and greatly oblige." That is the first we ever heard from them at all.

The Court: I will sustain the objection to that, I do not see how it [effects] this case at all.

Q. What is the next letter?
A. The next is a letter from Mr. Gibson.

Q. (The Court): As to the letters relating to this policy only, Mr. Hobson?
122 A. There was no letter relating to this policy upon which suit was brought, until July, 1893. There were some conversations about the matter.
Q. I will come to that later?
A. The letters in July, 1893, and from that time on, related, or rather the first letter was in June, 1893, transmitted this policy to us.
Q. (What policy is that? The Sun or North America?
A. No sir, the North America. On June 14, 1893, is the first letter we had from Benson, Kirtland & Rice about the policy. No, that is about the Alliance policy. I am mistaken.

Q. Now, Mr. Hobson, at what time did your Company purchase the note or become liable or become responsible for it to the Scottish Company.

Defendants object.

The Court: I think that it is a conclusion, Mr. Campbell. He has stated the fact and this is a question which the Court must determine.

To which ruling the plaintiff duly excepted.

Q. Now, Mr. Hobson, what if any, agreement did your Company have prior to the 12th of June, 1893, with the Scottish Company for the repurchase of loans, that you had made with them?

Defendants object. Objection overruled. To which ruling the defendants duly excepted.

A. The contract was an oral contract. Our original arrangement with the Investors Company was made back in the year 1892.

123 Mr. Williams: We object to his going behind the sale of the note. It is incompetent, immaterial and irrelevant. The note is endorsed without recourse and shows for itself the terms of the sale, and all preceding negotiations are merged therein. The evidence offered tends to contradict and vary the terms of a written agreement.

Witness: That is the time we made the original contract with them about the repurchase of the loans.

The Court: You may state what it was and answer the question.

To which ruling the defendants duly excepted.

A. Mr. Guild, of the firm of Guild & Shepherd, the secretaries of the company, was over here personally and I carried on the negotiations with him personally, looking to the establishment of correspondence with his company. The arrangement made with us was substantially this: they would repurchase loans from us whenever they had the money so to do, relying upon our judgment and recommendation, without any investigation whatsoever in reference to the value of the property, the validity of the loan, &c., and that we, on the other hand, would under all circumstances stand back of them, and any loans that we sold them, when they became due, if not paid, that we would take them up if they were not satisfied to renew them. Under that arrangement we were either to write them or wire them as the case might be, if we had a loan of a

certain amount, at a certain rate of interest, or giving the date; and they replied; and that arrangement has been kept up to the present time. I do not know as I am justified in
124 saying, Mr. Campbell, that that was an agreement that might have been enforced in Court; it was an arrangement made with them as correspondents, and we have it with another correspondent, in addition to that company, and we have always observed it.

Mr. Williams: We ask to have that testimony stricken out.

The Court: I do not think it throws any light upon the question here, Mr. Campbell, at all.

Mr. Williams: The note shows for itself, exactly what the transaction was.

Mr. Campbell: You will notice that this is not any contract made with these parties. Those persons considered themselves morally obligated to this company to repurchase that loan. Then they certainly had an insurable interest, for they had a right to take care of the interests of the stockholders.

Mr. Williams: A moral obligation does not create an insurable interest.

Mr. Campbell: Not so far as you are concerned.

The Court: I think it must be a legal obligation.

To which ruling of the Court the plaintiff duly excepted.

Witness: I am not willing, if your Honor please, to swear that that was such an agreement as could be enforced in court, and I do not think I would be justified in going that far, but it was an obligation that we always carried out.

Q. Now, Mr. Hobson, I notice that in the letters you read this morning, the correspondence between your folks
125 and the Scottish Company, something signed by John F. Bell. What official position did Mr. Bell occupy towards the plaintiff in this action, at the time those letters were written?

A. Mr. Bell has been secretary of the Company ever since its organization.

Q. State whether or not he wrote those letters, or dictated them, or who wrote them?

A. The entire correspondence that I read this morning, so far as it relates to The International Trust Company, was dictated by me personally, with the exception which I shall refer to. The letter of May 29th was not dictated by me. It was dictated I suppose by Mr. Bell. It is signed by him. The let-

ter of June 7th was not dictated by me; it was dictated by Mr. Bell.

Q. How about June 13th?

A. The entire correspondence otherwise than that—I should say all the letters of The International Trust Company, other than those mentioned, and with the exception of the letter of August 22nd, which was a short letter acknowledging the receipt of the note for $50,000, were dictated by me. I gave personal attention to this correspondence from the time that I found out that they wanted their money.

Q. Now, calling your attention, Mr. Hobson, to the letter of June 13th, I notice you use this expression in this letter: "You need not have the least anxiety about this loan or security, for whilst we do not legally guarantee any loans, we always stand back of our correspondents to protect them, and at any time we would rather take up a loan than to have them dissatisfied." I will ask you to explain what you meant by that sentence?

126 Defendants object because it shows for itself. Objection overruled. To which ruling of the court the defendants duly excepted.

A. I simply meant this, Mr Campbell: The letter is a little broad in some of its terms. We never guaranteed the note on its back. We did, as I have heretofore referred to, with some customers—to-day we have two, this company and another, we have made an arrangement with them by which we do not guarantee papers so as to have our obligation standing in the market, but we do take up their loans if desired to, and that is what we refer to here. The letter is a little broad. It does not apply to all of our correspondents, only to some of them.

Q. Now, turning to the letter of September 5th, the letter addressed to Messrs. Guild & Shepherd, I notice in that letter you use the following language—this is the letter as signed by John F. Bell. You say: "I must frankly admit that we are extremely averse to paying as high a rate of interest as 9 per cent. a year and I had hoped that in view of our prompt action in assuming personally this loan (although we were not legally liable for the same), that your directors would deal somewhat more liberally with us." What do you mean by that?

A. That refers to the same matter. I explained in the testimony that the Court ruled out, that I did not think I could say that the original arrangement we had with Guild & Shepherd—with this company—was a legal obligation, but was a moral obligation, and I refer to the fact that notwithstanding the opinion that I had that we were not legally liable,

127 that we promptly assumed the loan personally, and that in view of those circumstances I thought they would not

be pressing us for the balance of the purchase money. I do not consider to-day that prior to the 12th of June that we had any contract with them that they could have enforced in law, but our company has never dealt with people on that basis, and we did assume the loan promptly, when they wished their money.

Q. You may state, Mr. Hobson, whether on the 12th of June you paid a visit to Pueblo with reference to this Gordon loan and the insurance upon the Mesa Hotel property.

A. Did you say on the 12th of June?

Q. Yes sir.

A. No sir, not on the 12th of June.

Q. What date was it?

A. I went down on the night of the 13th, and got to Pueblo after dark, on the 14th, about one o'clock, I think. I was there on the 14th.

Q. On that visit state whether or not you had any negotiation or interview with the agency of the North America Fire Insurance Company, the defendant in this action, or any representative of their firm, the firm of Benson, Kirtland & Rice?

A. I had.

Q. State what your purpose was in going to Pueblo at that time, and if you negotiated with those parties, Benson, Kirtland & Rice, or their representatives.

A. My purpose was to determine whether the International Trust Company should give Mr. Gordon an extension of his loan. He had applied to us a few days before, when he had met the members of the executive committee, and it was
128 under their instructions that I went to Pueblo to investigate the entire status of affairs with regard to the hotel, to see the building and examine it, and especially to examine with regard to whether the insurance would continue to be carried on the building, and I took all of our policies down with me at that time, and I so stated to Mr. Shepherd in the office of Benson, Kirtland & Company, fully what the purposes were.

Q. What did you first do after you got to Pueblo?

A. After breakfast on the morning of the 14th I got Mr. Gordon and Mr. Beaumont and we went over immediately to see the building, and I examined it from top to bottom, and even went on the roof, and climbed out on it, and into the cellar; and I found that the building had progressed very little from the condition in which it had been at the time we made the loan. I do not suppose $2500 had been spent upon it, and after ascertaining its condition I was a good deal disgusted about it, finding that our money had not been spent upon it. I immediately went back to town and arranged to see whether there was any change of title to the building in any way affect-

ing it. I went to the abstract office, and upon my agreeing to order an abstract, which I did, they referred to their books and gave me the information I wanted about the title. From that point I went to the office of Mr. Morris, who was the agent of the Sun and some other companies which we had. From there I went to the office of Benson, Kirtland & Rice. Mr. John R. Gordon was with me all the time, or practically all the time. He was with me at both of these offices.

Q. Now, who did you find at the office of Benson,
129 Kirtland & Rice, and what occurred there between you and the person you found there with relation to this insurance?

A. I went in with Mr. Gordon to the office of Benson & Kirtland, I suppose it was—the firm had changed at that time—and I was introduced by Mr. Gordon to a young man named Shepard. I have since identified him as Shepard who has testified in the equity case. As soon as I was introduced to him I mentioned the fact that I was down there to investigate and see about Mr. Gordon's insurance on the Mesa Hotel Property, and I asked him whether he was authorized to represent the companies and his firm of Benson & Kirtland in regard to the matter. He said that he was. I then explained to him that Mr. Gordon's loan had expired on the 12th of June two days before, and that Mr. Gordon had applied to the Trust Company for an extension of the loan; that we were considering whether we would extend it or not, and that I had come to Pueblo for the purpose of making a full investigation of the condition of affairs generally before determining whether we would extend it. I said to him expressly that the matter of the insurance and whether the insurance could be kept up was a very important element in determining whether we would extend the loan. I then stated to him that I had just been over the building to make an examination of it, and I found that the work had stopped on it some time before; and I went into quite a detailed statement with Mr. Shepard as to the condition of the building. I explained to him how far it had
130 progressed, and the fact that there were no windows in it and no doors, and that there were no floors, and, in fact, went quite fully into it, and after doing that I said to him: "Now we want to know"—I do not mean these were the exact words, Mr. Campbell, because I am not undertaking to give the exact words—I am giving the substance of what I said to him—"we want to know whether under the circumstances your companies are willing to continue this insurance, and we want to know at once, some policies expire to-day, and if you will not we have made arrangements with Mr. Anthony Sweeney, an insurance agent in Denver, to place the insurance through him."

Mr. Williams: I object to this testimony because immaterial, incompetent and irrelevant. It is all an interview, in the first place, with a party who had no authority.

The Court: I do not think so. You are assuming that. He assumed to act. If he was not your agent you can show it.

Mr. Williams: Our further objection is that it is entirely immaterial. This contract they sued us on was written on the 6th of July, and I do not see the bearing of this conversation upon this contract.

The Court: You may proceed, Mr. Hobson.

To which ruling of the Court the defendants duly excepted.

Witness: I had stated this to Mr. Shepard and had told him that we wanted to know immediately, for the reason that we had arranged insurance elsewhere. He said that they knew the condition of the hotel very well—or, perhaps he did not say "very well"; he said they knew the condi-
131 tion of the hotel, and I remember he went on to express his regrets that Gordon had gotten into such financial shape that he could not carry [the on] building, and that was in reply to a remark I made to him about Gordon's financial condition; that Gordon was flat on his back financially and was unable to proceed; that he hoped to get money at an early date, but that it was very indefinite and uncertain whether he would get money. He expressed his regrets and said that he sympathised with Mr. Gordon, and hoped that Gordon would soon get on his feet. He then made the remark to me that "We will continue the insurance," or "take care of the insurance, as long as our premiums are paid, and you need not go to any Denver agent to get insurance," and I replied "Well, we are good for the insurance," substantially that. As soon as we had that conversation I took out of an envelope, like this, except smaller, the four policies that we had in his agency. They were the Alliance, the National of Ireland, the Norwich Union and the North America. I examined them with Mr. Shepard; we went over them together and examined them and ascertained that only one of those policies expired that day—that was the Alliance policy. I called his attention to it and he said substantially "All right, we will send it up to you at once," and I then substantially asked him whether the other policies would be sent up as they matured, and he said they would; and that about closed the conversation. I put the policies back in my envelope and went out. And the Alliance policy was sent to us and received within two days afterward. I recall that for I see that the Alliance policy expired on June 14th.

Q. State who else was in the office at that time.

132 A. Mr. Gordon was with me. [Mr] recollection is that there was no other person in that office. There were two rooms, and I remember distinctly seeing a young man in the back room. I saw a young man in the back room in his shirt sleeves, sitting at a desk, but who he was or what connection he had with the office I do not know.

Q. Now state whether or not he assumed there to act for the agents of this firm of Benson Kirtland & Company.

A. The first question I asked him was whether he was authorized to represent the companies of the firm. He spoke in regard to those things, and he said he was; and moreover, the most of the letters that we received were signed in the name of the firm by Mr. Shepard, and a good many of the policies have his signature on them.

Q. Now, what, if anything, was said by you there to him with reference to the foreclosure of this loan if the insurance was kept up?

A. The first part of the conversation was directed to the point that Mr. Gordon had applied to us for a renewal of the loan and we were considering whether we should renew it, and that if we could not make arrangements, and arrange about the insurance especially, that we should proceed to foreclose and take steps to complete the hotel ourselves. That is my recollection of what I stated to him. But the whole purport of the conversation, Mr. Campbell, was to find out, after telling him of the condition of the hotel, whether they were going to carry the insurance or not, as an element in determining whether we would carry the loan or push the foreclosure. That was the purpose I went there for.

133 Mr. Williams: We ask to have that stricken out, that that was the whole purport of it, as incompetent and immaterial. And it was some weeks prior to this contract.

The Court: The testimony may stand.

To which ruling of the court the defendants duly excepted.

Q. Did you ever have any other interview with any of the representatives of the North American Insurance Company, prior to the 9th of October, 1893?

A. I had one other conversation, Mr. Campbell, either on the 22nd or 23rd of September, just before I went East, but it was very brief and I could not state who it was with, only that first they had written demanding the premiums from us, and I was in Pueblo and went in there just a moment and asked a question about the amount of the premium, and told them to send the bill to The International Trust Company, and it was sent up, and we paid it.

Q. Now state whether there was any correspondence between you and Benson, Kirtland & Rice or Benson & Kirtland, subsequent to this interview with Shepard?

A. There was with The International Trust Company, yes sir. Do you mean confining myself to this insurance alone?

Q. Yes sir?

A. There is a letter of June 14th, the same day I was sent the Alliance policy—but that was another policy. The first correspondence that we had.—the original letter is here, and I will swear to its being the letter—it was produced in the equity case of Benson & Kirtland, I believe, and was a letter from Mr. Gibson our secretary, dated July 6th, as follows:

134 "Policy No. 1934 of the Insurance Company of North America, issued by you to J. R. Gordon on the Mesa Hotel for $10,000.00 matures to-day. Please have renewal policy sent us at once. I enclose herewith a few of our loss clause blanks."

That was Exhibit 13.

Mr. Campbell: We offer this if evidence.

Said letter was thereupon marked Exhibit 7.

Witness: The next letter is dated July 22nd, and is addressed to Benson, Kirtland & Rice, Pueblo, Colorado, and is as follows:

"You have issued the following policies upon the Mesa Hotel to J. R. Gordon: Alliance policy, $10,000, expiring December 14th, 1893, National Assurance Co. $10,000 expiring Sept. 8th, 1893. We notified you on the 6th inst. of the expiration on that day of policy No. 1934 of the Insurance Company of North America for $10,000, requesting that you send us renewal policy at once. To this letter we have had no reply. Kindly send us the renewal policy or if for any reason you are unable to issue it, let us know at once. I understand that work upon the Mesa Hotel has stopped, and I write to ask whether under the rules of your Company this forfeits the policies, and if so what would be required to keep the same alive. Our interests in this matter are identical and I would like to have you give the matter attention at once. Yours truly, John F. Bell, Secretary."

There was no answer received to that letter whatsoever.

Plaintiff offers said letter in evidence and the same is thereupon marked Exhibit 8.

Witness: On July 26th Mr. Bell again wrote Benson & Kirtland as follows:

"We wrote you on the 6th inst. and also on the 22nd in reference to the insurance on J. R. Gordon's Mesa Hotel. One of the policies for $10,000 has recently expired, and understanding from Mr. Gordon that he had arranged with you for keeping these policies in force we asked that you send
135 us a renewal policy for this amount. This is a matter of considerable importance and we trust that we are not asking too much in requesting a reply by return mail, both in reference to this renewal and the vacancy of the hotel affecting the policies."

We received no reply to that letter. The next letter was on Aug. 4th, as follows:

"We wrote to you on the 6th, 22nd, and 26th of July with reference to the John R. Gordon insurance on the Mesa Hotel. I think you might have the common civility to at least reply to our letters. The matter of this insurance is important and surely it is not asking too much to be informed of the present condition of affairs as far as your insurance is concerned. Yours truly, John F. Bell, Secretary."

We received a reply, a letter in reply to that from Benson & Kirtland, as follows.

Q. What date is that?
A. This is dated August 5th, being Exhibit 17 in the chancery case:

"Mr. John F. Bell, Denver, Colo., Dear Sir: Your letter of 8/4 received and contents noted. In reply will say that we have written you regarding the insurance on the Mesa Hotel several times. The North America policy referred to was renewed on July 6th and mailed to you and you afterwards called at our office, saw the renewal on our books, examined it, and found it all O. K. You ought by this time to be thoroughly satisfied that the policy is renewed and in your possession. The other policies are still in force and will remain in force until notified to the contrary. I would further suggest that you in future employ a correspondent with the common civility to at least write a courteous letter if you expect a reply."

This letter as well as that I have read—I saw this correspondence for the first time when this letter of August 5th was received. I did not see that letter of July 4th—or 6th, I believe it is—. I was in Denver when Mr. Bell wrote this letter
136 asking about the stoppage of work, but I did not see the letter. I was out of the city on the 26th of July, and on the 4th of August, and on August 5th when I returned, which was the next time I was in the office, this letter was put on my

desk, and I immediately called for the correspondence leading up to it, and then ascertained that these letters had been written. It was then that I ordered a search to be made for the policy, and it was found hidden away in one of the pigeonholes, but at that time I explained to Mr. Bell that I had gone over this matter of the stoppage of work on the hotel in June when I was down there, and we dropped the correspondence at that point.

Q. Now have you given all the correspondence between the plaintiff in this action and Benson & Kirtland?

A. Up to August 5th, yes sir.

Q. Up to the time of the fire?

A. No sir, up to August 5th. I want to say furthermore that this reference about going into his office, was to my trip of June 14th. It was not to one I made in July. The next letter is dated September 15th and is from me personally to Benson & Kirtland. I am reading from copies—the originals are all in here, but the copies are more convenient:

"In reference to the Gordon insurance, I would suggest that you let it stand until I go down to Pueblo next week, when some definite arrangements will be made on the subject. I suppose that if Mr. Gordon does not pay that I will have to do so. It will be a favor if you will not cancel the policies as it will necessitate my renewing them up here."

That letter is not in answer to any letter and I cannot
137 remember very distinctly just the occasion for it, but the best of my recollection is that I had received notice from Mr. Gordon personally giving the information that Benson & Kirtland had told him that unless the premiums were paid they would cancel the policies, and I wrote this letter to them on the strength of that. There is no evidence of any letter whatsoever being written that called this out. On September 18th Benson & Kirtland replied to me personally as follows:

This is Exhibit 19 in the equity case:

"Your letter of 9/15 received and in reply will say that we will do our best to carry the hotel insurance for you, will at least keep you covered under the policies you now have until you come to Pueblo, and trust that some arrangement can then be made for the payment as our companies are crowding us for the money."

On September 23rd they wrote us another letter as follows, being Exhibit 20 in the Chancery case:

"I enclose herewith a statement of balance due for insurance on Mesa Hotel, as requested by Mr. Hobson. Trusting this

will receive your early attention, we are yours respectfully, Benson, Kirtland & Co."

There is another letter here, Mr. Campbell, which is out of place, and it is on September 22nd, and is in reply to a letter of September 18th, being Exhibit 33 in the chancery case. On the 22nd I started for Pueblo. On the way down I stopped at Colorado Springs, and expected to be detained there another day, so I wrote this letter to Benson & Kirtland, but getting through with my business I went on to Pueblo, and after I had gone I suppose the letter was signed in my name by Pierce, the clerk in our Colorado Springs office, and forwarded, not-
138 withstanding that I had gone to Pueblo. It is as follows:

"I had a plan to go to Pueblo to-day and got as far as Colo. Springs and was detained here. I suppose that we will have to pay the insurance on that Mesa Hotel, and if you will send the International Trust Co. a statement of your account we will give the same attention."

Now, as I say I went to Pueblo in the afternoon and saw them that night or the next morning, I cannot remember which, but I walked into the office, exchanged a few words about the premiums and told them to send a statement up to the Trust Company. After that they wrote this letter of September 23rd: to the International Trust Company: "I enclose herewith statement of balance due for insurance on Mesa Hotel as requested by Mr. Hobson. Trusting this will receive your early atten tion." As soon as we got that we waited a day or two and on September 26th we wrote as follows to Benson & Kirtland; I wrote personally:

"Enclosed please find check for $282 in payment of within bill. Be kind enough to make out an itemized bill showing what the insurance is for and policies. I would also call your attention to the fact that we ought to have from your company $40,000 insurance, whereas, we only have $30,000. According to our insurance record we have policy in the Norwich Union for $10,000 which expired August 26th and Mr. Gibson says that when he was down there you told him you would send up the renewal immediately. There is another policy which we hold in the National Assurance Company which seems to have expired Sep. 8th so that at present we only have $20,000 in force with you, or rather only have policies for that amount. Will you please write an explanation of this at once so as we can know how the insurance stands."

139 We received no answer whatsoever to that letter. I went East within a few days, I think, afterwards, and I

knew nothing more about the matter until the fire. There was no further correspondence up to the date of the fire. That is the status, practically all the correspondence which we have had with Benson & Kirtland.

Q. Who was the state agent of the North America Company at this time in the State of Colorado?

A. Well, I have since been informed by the officers of the Company that Mr. Benson was their State agent.

Q. What are his initials?

A. M. V. B. Benson.

Q. State whether or not he is the Benson whose name figures in the name of Benson, Kirtland & Rice?

A. So I have been informed.

Q. Now, Mr. Hobson, I wish you would examine the record here in the Norwich Union case, and turn to the abstract of title, which we will introduce in evidence. Can you turn to that, Mr. Hobson?

A. There are three abstracts here, Mr. Campbell.

Q. We only want to offer in evidence the abstract of title up to the 16th day of June, the part that Mr. Hobson ordered from the office down there. I believe you testified you ordered an abstract?

A. Yes sir, I ordered it on the 14th of June.

Q. And did you afterwards receive an abstract of title?

A. Yes sir, I received the one certified as of the 16th. We received it a day or two afterwards.

Q. Is that the abstract of title in this record of the Norwich Union case?

A. This is the abstract here upon which we made the loan, and certified down to the date of our loan, and the next
140 abstract is an abstract certified as of the 16th day of June, 1893, and this was the abstract I ordered on the 14th of June, 1893, and that abstract constitutes the first two pages and a half of Exhibit 2, and down to the name of "Thomas J. Downing, Prest. 6/16/93."

Mr. Campbell: Now we offer in evidence so much of this abstract down to the words "Thomas J. Downen."

The Court: On what page?

Witness: It is Exhibit 1 and part of Exhibit 2; down to the middle of page 3 of Exhibit 2 in the chancery case.

Said portion is thereupon marked Exhibit 9.

Q. Who paid the premium upon this policy now in suit?

A. We did; we paid every dollar of it.

Q. (The Court) Do you mean the International Trust Company?

A. Yes sir, The International Trust Company.
Q. Do you know whether this property was destroyed by fire, if it was so destroyed?
A. I only know by hearsay. I was in Chicago at the time and got a telegram on the morning of the 10th of October, 1893, informing me that the hotel had been destroyed.

The Court: Is there any variance between you gentlemen as to the date of the fire?

Messrs. Williams and Smith: No sir. It was on the 9th of October, 1893.

Q. You say you were in Chicago, Mr. Hobson, at the time of the fire?
A. Yes sir.
141 Q. And you know nothing personally of a notice being given to the company immediately after the fire?
A. I know it from the records of the office, from copies of it in the office, and acknowledgements of the receipt of the notice.
Q. I will ask you if you have with you copies of the notices that were served on the North America Company, notifying them that this fire occured on the 9th of October?
A. That is a copy of the notice which was sent to the Insurance Company of North America. Here is the registry card and receipt and we have also a letter I think from the Company acknowledging the receipt of it.

Mr. Campbell: We now offer in evidence, if your Honor please, the letter dated October 12th, 1893, sent by John F. Bell, Secretary, and addressed to the Insurance Company of North America and Messrs. Benson & Kirtland, Agents, notifying them that this fire occurred.

Said letter is thereupon received and marked Exhibit 10.

Q. Did you receive any [acknowledgement] of that?
A. Yes sir, we got an [acknowledgement] dated October 17th, from the Second Vice President of the Insurance Company of North America, acknowledging receipt of that notice. We also have the registry receipt.

Mr. Campbell: We now offer in evidence as acknowledging notice of the fire, the letter signed E. L. Ellison, I believe, dated October 17th.

Said letter is thereupon marked Exhibit 11.

Mr. Campbell: We now offer in evidence proofs of
142 loss made by the International Trust Company on this policy. Said paper is thereupon marked Exhibit 12.

Q. I will now ask you what that paper is, Mr. Hobson?

A. That is our proof of loss, Mr. Campbell. This is Mr. Gordon's proof of loss.

Q. Just examine this paper, Mr, Hobson, and state what it is. (Hands to witness.)

A. This is the original proof of loss which we served upon the insurance Company of North America on or about November 2nd or 3rd, I forget which date we served it. It was prepared by me personally and the blanks were filled in by me in my handwriting.

Said paper is thereupon marked Exhibit 12.

Q. Just one moment before the cross-examination begins: You say that Benson & Kirtland rendered you a bill for insurance of this North America Company?

A. They rendered us a bill, and we returned them the bill and they never sent it back.

Q. Where is that bill?

A. I do not know, but after the fire had occurred Mr. Gibson was in Pueblo and made a demand on them for a statement, and they did give us a statement, and that is in evidence in the Norwich Union case.

Q. Could you turn to that?

A. The statement which was rendered us after the fire is Exhibit 38 in the case of the International Trust Company against the Norwich Union Company. Shall I read it?

Q. Yes sir, read it?

A. It is:

"J. R. Gordon to Benson & Kirtland, Dr. 1892, Dec. 31, to Alliance $105; 1893, Jany. 31, to North America, $105; Feby. 28, Norwich Union, $105; March 31, National $105; June 30, Alliance $105; July 31; North America, $105."

143 That is the policy which is in suit here. Then follows a lot of credits, including the credit of September 26th, 1893, of $282, paid by The International Trust Company.

Q. Does that show that it was paid by The International Trust Company?

A. No sir, that does not. It shows, "By cash, $282."

Q. That is $282. State who that was paid by?

A. That was paid by check and I have the check here endorsed by them and returned to us.

Mr. Campbell: We will offer the check and the account.

The Court: Very well. That goes into the case of the North America Company.

Thereupon said account together with check are thereupon marked as Exhibit 20.

Mr. Campbell: Now we will offer these letters in evidence in relation to the North America Company, and they may be marked as Exhibit 19.

Said letters were thereupon marked Exhibit 19.

Mr. Williams: We will object to the introduction of this paper here, as a statement of the account.

The Court: No, you cannot object to that. It comes from your company. His testimony was that they sent a bill, which was returned and never sent back to The International Trust Company that they forwarded their check to pay $282, which included the $105 due upon this North America policy. And he offers then to support his statement by offering the
144 check, and testified further that this statement after the fire was furnished by the general agent of your Company; so that I think it is competent. There is no question about it.

Mr. Williams: Do I understand that this is offered as being the statement of account which was furnished at the time this $282 was paid?

The Court: No sir.

Mr. Campbell: It is offered to show that we paid you $105 on the policy in controversy.

Mr. Williams: That is the only purpose for which it is offered.

Mr. Campbell: Yes sir, we cannot separate it.

The Court: It is offered for that purpose. There is an item there of $282. Mr. Hobson testifies that that includes $105 for this policy, and he offers the check in connection with that statement furnished by your company, in relation to the account, showing that The International Trust Company paid it, and it is simply for that those papers are offered, to support his statement that the premium on this policy was paid by The Trust Company.

Mr. Williams: We will object in this way then. We will object to the introduction of this statement for any other purpose than to show that The International Trust Company paid the premium on the North America Insurance Company policy.

145 The Court: That is all it is offered for, as I understand.

Cross-Examination.

By S. G. Williams, Esq.

Q. Mr. Hobson, you testified that the International Trust Company paid interest of $1750 upon the Gordon note, which matured or accrued, on the 12th of June. I will ask you if it is not a fact that on or about the 19th of June Mr. Gordon paid that back to you?

A. Some time in the latter part of June, Mr. Williams, Mr. Gordon did pay us back $1750, after we had agreed to let the loan run along, without any definite extension.

Q. That was along about the 19th of June.

A. Yes sir.

Q. The interest from the 12th of June, upon the Gordon note, up to the 12th of September, at which time you dated your repurchase from the Scottish Investment Company, the interest was added to the principal as part of the purchase, was it not?

A. I do not exactly understand your question Mr. Williams. We did not date our repurchase from September 12th. We dated our repurchase from June 12th.

Q. On the 12th of September, you stated in your testimony that you calculated interest, because of its being one quarter's interest, and that you paid it from the 12th of June up to the 12th of September, did you not?.

A. Yes sir, paid it in cash.

Q. That was the interest which accrued upon this Gordon note?

A. No sir, it was interest upon what we owed to the Investors' Company. We owed them $50,000 from the 12th of June for the repurchase of the Gordon note, and we paid
146 them interest on that amount—seven per cent. up to the 12th of June. We were charging Gordon ten per cent. and when we collected the first insurance money from the Alliance Company we deducted the interest on Gordon's loan up to the date that we got the money, at 10 per cent. They were two entirely separate and distinct matters. The money that we paid to the Scottish Company on September 12th was at 7 per cent, and was on account of our repurchase of the loan on June 12th.

Q. What interest was the note bearing?

A. The original Gordon note up to the date of maturity bore 7 per cent, but from the time it was matured we notified Mr. Gordon that we would have to be paid 10 per cent as long as we kept it for him.

Q. You paid then, the Scottish Investors' Company 7 per cent. interest upon this Gordon note, or upon this $50,000, from the 12th of June until the 12th of September?

A. No sir, we paid it on our indebtedness to the Scottish Company, and from the 12th of September, and under the arrangement with them we gave them our own note at 9 per cent.

Q. Didn't you state that you paid the interest on the Gordon note from June 12th to the 12th of September?

A. No sir, I stated that we paid them interest on our indebtedness. They did not own the Gordon note, for we had taken it up, and they had accepted our offer.

Q. You understand that is the question in dispute?

A. We never considered that they owned the Gordon note.

147 Q. I have not asked what you considered.

A. Or we would have given the full rate of interest on it.

Q. In regard to this interest which you have testified that you paid from the 12th of June until the 12th of September, is what I am asking about?

A. We paid that interest on account of our indebtedness to the Investors' Company, based on our repurchase of the note. We collected interest on the Gordon note from Gordon at 10 per cent.

Q. You did not collect any interest on the Gordon note, did you?

A. We collected it later on, but we were charging it on our books at 10 per cent.

Q. Upon page 375 of your Real Estate Loans" where you have entered this note, on account of the Investors Mortgage Security Company, you have under date of September 12th, "Interest, $875." That is interest upon what?

A. That is interest upon the amount we owed the Investors Company from the 12th of June up to the 12th of September.

Q. That is 7 per cent upon $50,000?

A. Well, I imagine so. Yes, sir, I believe it is. That is the amount we owed them.

Q. That is the amount of interest that this note was carrying up until maturity, was it not, at 7 per cent?

A. The Gordon note?

Q. Yes sir.

A. Yes sir. That was the amount it drew up to maturity—7 per cent. We could make no loan for Investors Company below 7 per cent. They required all their loans to bring 7 per cent. that we make. I would like to explain this entry, Mr. Williams. Those were entries made by Mr. Bell to square up this account so as to take it off the books in pursuance

148 of my written memoranda written underneath there.

Q. When you received this note on September 12th, for that is the date of this entry at which those charges were

made, you received the benefit of the interest on the note from June 12th up to that date, did you not?

A. We did not receive the note on September 12. We received the note originally in the early part of June.

Q. It was September 12th when you balanced this account and made these entries here?

A. We paid interest on the Gordon note from June 12th up to the present date; that is, so far as it has been paid, from June 12th, 1893.

Q. Referring to this book again Mr. Hobson, you have the following entries on September 12th, at which this interest is credited and charged. You have the entry "Repurchased from Investors Security Company, Ld. 12 June, 1893, and carried back to page 42, Loan 541." When was the entry made upon this book?

A. I said that so far as the ink entry was concerned I could not swear positively. So far as the pencil entry is concerned it was made by me, and they followed this identical copy—that was written the day before or the day we sent the $10,000 to the Investors Company. It was in the latter part of September, 1893. I wrote that before I went to Chicago, and my recollection of it is that Mr. Bell immediately took a pen and wrote over it, but the pencil memoranda is in my handwriting and made in the latter part of September, 1893.

Q. This is the first entry you made upon this book
149 with reference to the repurchase, is it not?

A. Yes sir, I did not keep the books.

Q. That any one made?

A. No one, so far as I know. My attention was called to it from the fact that I looked at the books at the time I sent the $10,000 and I ordered the loan to be transferred to our own account, and it was done.

Q. Referring to page 42 upon which is the original entry of this note, immediately under the red ink entry of "transferred to page 375 Loans for Acct." is the entry "Repurchased of Investors Mortgage Co. Ld. 12 June, 1893." When was that entry made?

A. To the best of my recollection it was made at the same time of the ink. You will notice we filled it in pencil from the time it was passed to the other account; so that, to the best of my knowledge, I say that it was made at the same time as that by Mr. Bell; it is in his own handwriting.

Q. The latter part of September, 1893?

A. Yes sir, and the reason I say this is that as soon as the loan was taken out of this account it would have been proper to transfer it to our own account so as to make our general books balance. The entry made here would be taken by a clerk and carried through his journals and day-books, and

carried into his statements of the company, and the minute the account goes from the Loans and Accounts to our own accounts it must appear here, and the entries are made at the same time.

Q. So in the due course of business the entry on page 42 was made directly following, or the same time as the entry on page 375?

A. Yes sir, it was made on the same day, or else the
150 books would have been out of balance $50,000, and I do not think our books have been out of balance a cent, to my knowledge.

Q. And this is the first entry upon your books about the repurchase?

A. So far as I know Mr. Williams. I think—I will say this—that in the entry on page 375 Mr. Bell had been erroneously carrying a large loan there, and he had made certain entries in his handwriting indicating the charge and rate of interest; for instance 10 per cent from June 1893; then changing the interest from $50 to $60. Those were entries made some time from the 12th of June to September, when I made this memorandum here, because that is what called my attention to the fact, those entries, that he was mixing up the loan accounts.

Q. What authority, if any, did Cuyler, Morgan & Company have with reference to the extension or purchase of this loan?

A. None at all, that I know of, sir. They are the depositaries and custodians of the securities of the Investors' Company, in New York, and they are simply collecting agents.

Q. With reference to any contract for repurchase or extension you corresponded with and received your information direct from Guild & Shepherd, in Scotland?

A. Yes sir, they are secretaries and managers of the companies over there.

Q. Referring to this correspondence regarding the repurchase of the loan, I wish you would state Mr. Hobson, at what dates those several letters were received by you, giving the dates on which they were written and the dates on which they were received?

A. The letter of May 26th from Cuyler, Morgan &
151 Company, according to our stamp mark, was received May 29th. The letter of June 2nd—the two letters of June 2nd, from Cuyler, Morgan & Company, one was received June 5th and the other June 7th. One was a registered letter I suppose.

Q. Did you give the dates of the two respectively, when they were received?

A. Yes sir, both dated June 2nd, and one received June 5th and the other June 7th. The letter of May 31st, trom Guild &

Shepherd, has no stamp mark upon it, but I fix the date by two things; one is the letter which I wrote to them the next day, the 13th, and the other is by a letter to John R. Gordon, dated June 13th, in which I speak of having received this letter on the day before, and the correspondence just introduced shows that we received it on June 12th the various correspondence in the case. That letter however, was received later in the day than the other letters which I shall speak of. The telegram of the 12th from Cuyler, Morgan & Company was received on the 12th. The letter of June 15th from Cuyler, Morgan & Company was received June 19th. The letter of June 14th from Guild & Shepherd was received June 27th. The letter of June 28th, 1893, does not seem to have any stamp mark upon it, but it takes about 10 days for a letter to come from them.

Q. What date was that?

A. June 28th.

Q. That would be received when?

A. I should say about 10 days.

Q. About the 8th of July?

A. Yes sir. The telegram of June 26th was received on June 26th.

152 Q. (Mr. Smith) Who is that from?

A. That is from Guild & Shepherd. It says: "Have you received your letter of 13th June, we will delay until 15th of September." That is the translation. The letter of August 5th, the receipt stamp is so blurred that I cannot make it out, but it was about 10 days after that, about the 15th. The letter of August 9th was received August 22nd. The letter of September 22nd was also—I cannot make out the mark, but it would be in about 10 days. The letter of September 27th was received October 9th.

Q. On June 10th, Mr. Hobson, you wrote a letter to Mr. Gordon referring to a meeting of the executive committee for the consideration of the extension of this loan, being Exhibit 18, in the case of the Norwich Union Society. In that letter I will ask you to look at it, if you please Mr. Hobson, you made the following statement: "I have been instructed to take up the note held by our correspondent, if desired so to do, * * * and I have accordingly written to advise them of our intentions. The matter has been left open in order to enable you to see what you can do in the premises." That is part of the letter you wrote?

A. Yes sir; I can explain that if you would like, Mr. Williams.

Q. That had reference to this meeting of the executive committee which you testified to, that was held prior to your going down to Pueblo, was it?

A. It was not a formal meeting. It was a meeting in one sense; that is, Mr. Gordon met the members of our committee; There were several meetings before I went to Pueblo;
153 one was on the 9th, and we held a meeting in Mr. Moffat's room on the 12th or 13th I think, but I saw the committee individually.

Q. There was no minute made of this proceeding in regard to the authority to purchase the loan?

A. No sir. We sometimes make no minutes of the committee. The members of the committee were consulted to get their judgment, and we generally got their approval.

Q. This note was endorsed by the Scottish Company The Investors' Security Company to John F. Bell, trustee, for the Investors' Mortgage Security Company, Limited, Signed Guild & Shepherd. What was the date of that endorsement?

A. Well, I cannot say that, Mr. Williams. We sent it to them in July, I think, and it was returned to us some time in August.

Q. Does your correspondence show when that was?

A. The correspondence shows when it was returned to us, yes, sir.

Q. Can you recall the date?

A. The note was returned on the 9th of August, 1893, from that letter.

Q. It is the date of their letter?

A. It was.

Q. And what time was that received?

A. That was received on August 22nd. They say: "We now send the same so endorsed."

Q. That was for the purpose of Mr. John F. Bell holding that as trustee, was it?

A. It was for the purpose of his holding it as trustee until we paid the money. We had the note in our possession until early in June, and kept it in our possession unendorsed, and I do not know just what the reason was that we sent it over and had them return it to us endorsed. We expected to
154 take it up in September, and they sent it back endorsed in that way, I suppose, for Mr. Bell to hold as trustee until we paid the balance of the purchase money.

Q. You received that from Cuyler, Morgan & Company?

A. We received it originally; yes sir, that is, in June.

Q. Under their enclosure of June 2nd?

A. Yes sir.

Q. In which they say:

"We enclose herein under registered cover and seal of our notary, Mr. J. N. French, the undermentioned securities: Note of John R. Gordon, dated Dec. 12 '92, due June 12, 1893, in favor of yourselves for $50,000. With coupon attached due

same date for $1750, together amounting to $51,750, for collection and remittance."

That is the letter of enclosure?

A. That is the letter we got from them.

Q, When you went to Pueblo on or about the 14th of June, you say you had the policy of the Insurance Company of North America with you?

A. Yes sir, and all other policies we had at that time—$60,000 in the aggregate.

Q. You did not see Mr. Kirtland at that time?

A. No sir.

Q. You had no statement in regard to Mr. Shepard, or his authority, except his statement to you when you went into the office.

A. No sir. We had policies and letter signed "Benson & Kirtland," and an "S."

Q. You are a lawyer, Mr. Hobson?

A. Yes sir.

Q. Is this the policy you had with you, Exhibit 4?

A. No sir.

Q. Expiring July 6th, 1893?

A. Oh yes, that is the policy Mr. Williams. We
155 have had it in our possession. It is the policy which expired on July 6th, 1893.

Q. And this policy has been in your possession since January some time, of the preceding winter?

A. No sir, in our possession from early in March. We received it early in March, 1893, and we had written about it but had not received it.

Q. This policy, Mr. Hobson, has the following provision in it: "VI. Conditions as to the renewals and cancellations—Miscellaneous provisions.—All renewals of this policy, to be valid, must be made by virtue of certificates of renewal, signed by the president and secretary of the company, and countersigned by the duly authorized agent of the company at the place of issue thereof. Every renewal shall be considered as made with reference to the original representations as to character, condition, value, situation, occupancy, encumbrance, exposures, and otherwise, unless varied by new representations reported by the assured, either before or at the time of such renewal, certified to by proper entry hereon. This policy shall be subject to cancellation at any time, at the request of the assured, the company to retain earned premium reckoned at the usual short rate for the time expired. The policy may also be at any time cancelled by the company, on refunding or tendering to the assured, his, her, or their agent or representative, a ratable proportion of the premium for the time expired, and where the insurance is made payable to a

third party, as collateral security, it shall not be necessary to give notice to, and have the consent of, said third party, in order to effect such cancellation. Any person other than the assured, who may have applied for or procured this policy, or any renewal thereof, shall therein be deemed to have acted as the agent of the assured and not of this company. Agents of this company have no authority to bind the company in violation of any of the printed terms or conditions of insurance as herein expressed; and no printed or written condition or restriction hereof, which, by its terms, may be subject to waiver, shall be deemed to have been waived, except by a dis-
156 tinct, specific agreement, clearly expressed in the body of the policy." I will ask you to look at that provision, Mr. Hobson, and see if I have read the provision correctly.

A. I do not care to read it.

Q. Now, with this policy in your hand, with this provision in it, what inquiry did you make of the young man in the office with regard to his authority?

A. I stated to him—I asked—the first thing after telling him who I was and the purpose I was there for—I asked him if he was authorized to represent the Company and the firm of Benson, Kirtland & Company, or Benson & Kirtland, whatever it was—they changed so often I could not keep up with them.

Q. Did you ask him whether he was authorized to represent them with respect to making contracts?

A. I did not make any specific inquiry I have stated as nearly as I can remember the inquiry and my—

Q. You did not ask him the nature of his employment?

A. No sir; I was there to see if the Companies would carry this insurance. That was after I asked him if he was authorized to speak for the companies and the firm, and I went very particularly into it and wanted to know, and stated to him fully and particularly the condition of the property.

Q. He was a quite a young-looking man, was he not?

A. Yes sir. I have seen him since. I saw [in] once in Pueblo afterwards, and saw him here.

Q. The conversation that you had at that time with regard to a policy which was to be sent up to you, was with
157 reference to the Alliance policy was it not, which expired on that day?

A. That question might bear a wrong construction. I had a conversation about the entire insurance. After I had had quite a conversation with him on the subject whether they desired to carry the insurance, then I took all the policies out of my envelope and we examined them together, Mr. Shepard and I, on the desk, and we found that the Alliance policy was the

only one that expired on that day, and he then said he would send it up immediately, which he did; but the conversation generally was about all the policies and about all the insurance.

Q. This policy which you have brought suit upon, Mr. Hobson, is dated July 6th, 1893?

A. Countersigned June 26th, 1893, Mr. Williams.

Q. Yes. That is your signature there, is it not: "International Trust Company, &c., accepted and agreed to"?

A. Yes sir.

Q. That policy Mr. Hobson, is entirely different in form of policy and contract, in all respects, is it not, to the one you had before?

A. To the best of my knowledge, there is some difference in it. I have not compared them paragraph with paragraph. I cannot say how far the difference exists. They appear to be different.

Q. This is marked here "Standard fire insurance policy of the States of New York and Pennsylvania."

A. I believe that is what they call a standard policy.

Q. This is the policy issued July 6th, 1893?

A. Yes sir.

Q. Have you copies of these letters in a bunch here, of Benson & Kirtland?

A. No sir, I have not.

158 Q. Then I will ask you to refer to this bunch here. You received on June 16th a letter from Benson & Kirtland, signed Benson & Kirtland, dated June 14, 1893, did you not?

A. Yes sir, it is signed.

Q. Marked Exhibit 12, in the Norwich Union Case?

A. Yes sir.

Q. Now that reads as follows:

"We hand you herewith policy No. 2316642, of the Alliance Assurance Company, renewing $10,000 insurance on the Hotel Mesa, which expires to-day. We are requested to do this by Mr. J. R. Gordon."

Was that received after you came back to Denver?

A. Yes sir, it was received on the 16th, according to our marks. It was received on that day; It was signed by Mr. Shepard, signed "Benson & Kirtland, Agents. S."

Q. Did you ever have any conversation with Mr. Kirtland in regard to that talk with Mr. Shepard?

A. I personally never saw Mr. Kirtland until about the time his testimony was taken.

Q. You have had no conversation with him, and had no correspondence with him relative to this interview on June 14th?

A. No sir, I never had any correspondence with anybody concerning the Interview.

Q. Mr. John F. Bell was the authorized representative of your company, was he not?

A. Yes sir, he was secretary.

Q. He was duly authorized to write these letters which were written July 6th, 26th and August 4th.

A. Yes sir.

Q. What was it Mr. Hobson, that you said to Mr. Shepard in regard to paying premiums?

A. When Mr. Shepard made the remark to me that "We will carry this insurance as long as our premiums are
159 paid, and you need not go to any Denver agent about it,"—that was substantially what he said: I do not say that that is the exact language,—I replied to him in substance that we were good for the premiums if Mr. Gordon was not, or words to that effect. I replied to him that we stood ready, or intended to reply that our Company was good for the demand and intended to pay it. Our mortgage clause called on us to pay the premium if Mr. Gordon did not. I recognized it.

Q. That was all the conversation you had with him on that point?

A. Yes sir, that was the entire conversation about the premiums there. I did not know at that time that the policies were in Denver; had never received any notice that such was the case.

These various letters written on July 6th, 22nd and 26th, to them you received no answers at all.

A. No sir, we never received any answers, and Mr. Kirtland has since told me that he has not written any answers, at least he testified that he had written no answers.

Q. No attention was paid to that correspondence until the 5th day of August?

A. No sir.

Q. When Mr. Kirtland referred in his letter of August 5th to a visit or supposed visit, in which he says:

"The North America policy referred to was renewed on July 6th, and mailed to you and you afterwards called at our office, saw the renewal on our books, examined it, and found it all O. K."

Q. You say that is a mistake?

A. Yes sir. There was no officer of our company at his office in July, and the visit that I paid to his office was on June
14th, when I did go there and saw that the Alliance pol-
160 icy—or was advised that the Alliance policy had been reissued and would be sent at once.

Q. Then you did not at that time make any examination of the books with reference to the North America policy?

A. No sir, I did not make any examination about any policy. We opened the policies on the desk and Mr. Shepard and I went over them, and when we found that the Alliance policy expired on that day Mr. Shepard told me that the policy was all right and would be sent us at once. He told me that they either had been or would be renewed, possibly had been countersigned at that time. I did not look at a book that time or at all. That is, I did not look at any of his books. That is the only visit ever paid at that time to his office. In that letter he has reference to that visit.

Q. You never had any conversation whatever with Mr. Kirtland or any correspondence with him in regard to the sale or transfer of the securities, did you?

A. None at all, sir. I did not think it was necessary to inform him. There is nothing in our contract with the companies calling on us to notify him of the transfers.

Q. So far as you were aware he had no knowledge of it?

A. So far as I know Mr. Kirtland,—neither Mr. Kirtland nor the companies ever knew anything about it.

Q. Nothing about that at all?

A. No sir; except this, Mr. Williams, that I feel pretty confident that when the loan was made they knew we had made it, and I also told Mr Shepard at the time I saw him in
161 Pueblo that we were the owners of the loan, and when Gordon was after us to renew it I told him that Mr. Gordon had applied to us and I was down there to see if we would renew it, and we were deliberating whether we would renew it, whether to foreclose. That was the substance of the conversation.

Q. You prepared and furnished a proof of loss, the one which you testified to, did you?

A. Yes sir.

Q. On the 16th of January, 1894, Mr. Hobson, you furnished that paper to the company, did you not? (Hands to witness).

A. Yes sir, to the best of my knowledge it was the 16th, or about that time.

Q. That was the paper and it was presented some time subsequent?

A. Yes sir, it was after the 60 days had expired and after our right of action had begun.

Said paper marked Exhibit 21 for identification.

Q. Mr. Hobson, these loss payable clauses and mortgage clauses, which were attached to these various policies, were prepared by The International Trust Company and furnished to the agents, were they not?

A. Yes sir; that is, most of them. There was one of the policies that did not have ours, but I think that was the Underwriters.

Q. This policy in suit—

A. They are both there—the mortgage clause is attached to both of these policies in suit and were furnished by The International Trust Company to the agents.

Q. Mr. Hobson, you had an intimate knowledge of the affairs of The International Trust Company about the time of
162 the making of this loan to Mr. Gordon, and also at the time of the writing of the policies in suit?

A. Yes sir, I suppose I had a more intimate acquaintance with the affairs generally, than any officer—that is to say I had more to do with the direction.

Q. You were a member of the executive committee?

A. Yes sir.

Q. And you were present at all meetings of the executive committee?

A. Well, I cannot say that, Mr. Williams. I was present at most of the meetings. I generally took a pretty active part.

Q. Now Mr. Hobson, I do not quite understand your testimony, or it was not clear to me, in regard to this interest from the 12th of June up to the 12th day of September. You said that you paid interest at 7 per cent upon $50,000?

A. Yes sir, from the 12th of June, when we agreed to take up the loan—the date at which we agreed to take up—that is, anterior; I know we contracted to pay the Investors' Company the same rate of interest that they had been getting—7 per cent—until the 12th of September, when we wanted some further time, and they then insisted we should pay them 9 per cent. and we paid them 9 per cent from that time.

Q. Then your arrangement for 9 per cent was from the 12th of September?

A. Yes sir. Mr. Guild was over here about the latter part of August, and I made arrangements with him personally.

Q. He is one of the firm of Guild & Shepherd?

A. Yes sir.

Q. Who are the secretaries of this Investors' Company?

A. Yes sir.

163 Q. And the arrangement with Mr. Guild was that you were to pay $10,000 in cash and give your note for $40,000?

A. No sir, not exactly that; our arrangement with Mr. Guild was that we should have another year to pay the money in, but that he would state the matter to his directors as soon as he went back, and receive their approval. Of course, anything he did was subject to their approval, and we were to give our note for $40,000, paying $10,000 cash, and were to put up a lot of collateral as security for our note. Mr. Guild examined the collateral, and even went and examined the property, that the

real estate notes were secured on; and we gave our note, and I have the note here.

Q. When did you give the note.

A. The note was given on September 12th, 1893, and was paid on January 5th, 1894, and has the collateral all set out in it. You will notice that it sets out that we obligate ourselves to pay $40,000 one year after date, and then we mention the collateral, that is, the loan of John R. Gordon, and a lot of other collateral, &c.

Q. Now you held a meeting of your board of directors, do I understand you to say, on the 9th day of June, Mr. Hobson?

A. No sir, we had an informal meeting of our executive committee. Our executive committee is different from our board of directors. Mr. Gordon had some little correspondence a day or two ahead of this—in this chancery case—and he came up and I sent out and got the members of the committee, and they were all within a stone's throw of the office, and we met him and had quite a talk with them.

164 Q. That is the meeting of which you kept no minutes?

A. No sir, we kept no minutes of a number of meetings of that kind.

Q. How do you fix the time of this meeting as on June 9th?

A. I fix it in this way, Mr. Smith; that I have introduced in evidence in this chancery case a telegram from Mr. Gordon. Mr. Gordon, I would say, went and left on the afternoon train to Pueblo. He went down about 2 o'clock and he telegraphed me from Pueblo on the 9th: "Write me action of the board." That refers to the executive committee. "Cannot come up." And I wrote him on the 10th saying, "The matter of the extension of your loan was brought up * * * * * and fully discussed." Mr. Gordon was at the meeting, however, and stayed some little while himself, and I fix the date of the executive meeting by that.

Q. Did you hold Gordon's note at that time?

A. Do you mean his—?

Q. His $50,000 note on the 9th of June?

A. I think so; I think we had received it. Yes sir, we received that note on the 7th.

Q. On the 7th of June?

A. Yes sir.

Q. You received the note, then as agents of the Investors Company for collection?

A. Yes sir.

Q. And you were informed by Mr. Gordon at that time that he could not pay the note?

A. Yes sir, and he had written to us. He left a note for me on May 30th at the office. This is on a telegraph blank. He called at the office—in which he says that he called to see me

on the hotel matter. "I had arranged when East to take
165 up your $50,000 at maturity, but got information yesterday to effect the panicky feeling may prevent getting it for present. I will call again soon and see you then. * * *"

Then on June 3rd I wrote him and suggested that he come up and see us in the matter. He telegraphed us on the 6th of June that he would come up. He telegraphed: "Letter received reach Denver Thursday. Information from east unfavorable. Please ask extension." That was the first definite information that we had from Mr. Gordon that he wanted the extension. That was the 6th of June, 1893.

Q. Then you had partially arranged for extending that note for Mr. Gordon?

A. No sir, we had not partially arranged, but I had arranged personally that if Mr. Gordon could make satisfactory arrangements we would extend it, and I wrote him in one of these letters telling him that he must be prepared to put up other security. That is the letter of June 10th. I had made up my mind. I say: "I have been instructed to take up the note held by our correspondent if desired so to do, and I have accordingly written to advise them of our intentions."

Q. You were acting then as the agent of the Investors Company?

A. Yes, at that time we both understood that they wanted to renew the loan.

Q. And you went to Pueblo to investigate the condition of the building as agent of the Investors Company?

A. No sir, I went to Pueblo after our committee had determined to repurchase the loan, but the Investors Company
166 wanted it paid, and I may say this, Mr. Smith, in explanation, that I had made up my mind to repurchase it, for the reason that Mr. Guild was expected over at any time, and I was ashamed to have Mr. Guild go down and see the loan made by us in the condition that it was.

Q. But you had not had any communication from them at that time about repurchasing?

A. Well, they sent the note on for collection; advised us on the 12th of June that they wanted the money paid. The letter was received on the 12th of June stating they wanted to have the money.

Q. You did not receive that until you got back?

A. That was received two days before I went to Pueblo.

Q. When did you go to Pueblo?

A. The night of the 13th. I was in Pueblo on the 14th. Mr. Guild comes over every year and inspects the properties that his loans are on, and I made up my mind that he could not see that loan, and that we would take it up. We were very much ashamed of the condition things were in, and I had

furthermore made arrangements to borrow the money from the First National Bank to do it.

Q. Just one more question, Mr. Hobson, in regard to the terms of the repurchase that you finally agreed upon with Mr. Guild, as I understand.

A. No sir, we never agreed upon terms with Mr. Guild.

Q. Subject to the approval of the Company?

A. No sir, we agreed with Mr. Guild, simply upon the Investors' Company giving us 12 months more to pay the balance of the note. Instead of paying September 15th we com-

167 pleted the repurchase at that time, ~~and are liable~~ but we agreed in substance to pay on September 15th, and my interview with Mr. Guild and my subsequent correspondence with the company was in relation to paying on September 15th, and the balance due we were to have a year at 9 per cent.

Q. It was with Mr. Guild that you agreed to pay $50,000 and 7 per cent interest, was it not?

A. No sir.

Q. Who was that agreed with?

A. The agreement to pay the $50,000 at 7 per cent. arose out of the fact that the parties demanded their money. We both cabled them and wrote them on June 12th, offering to take the loan ourselves, and they replied accepting it. I knew they would accept it because I knew they wanted the money.

Q. Now did they accept?

A. They replied in June some time, the cablegram was on June 26th, to that effect.

Q. Is that the correspondence that you have introduced in evidence?

A. Yes sir, you have all the correspondence here on the subject. They accepted it, and there never was a word said at that time about the interest we were to pay them.

Q. My question is, when was it that you agreed with them to pay them $50,000, with 7 per cent interest from June 12th to September 12th?

A. We agreed to pay them at the time we offered to repurchase the note.

Q. When did you do that?

A. We made the proposition on June 12th.

Q. Where is that proposition?

168 A. It is in our cablegram and letters.

Q. Did you state anywhere that you were to pay $50,000 and 7 per cent.?

A. No sir, we agreed to repurchase the loan, and we were not going to repurchase it at a discount.

Q. You do not understand the question, or else evade it. I want to know when you agreed to pay them $50,000 with 7 per cent. up to September 12th?

A. Mr. Williams, we made the proposition to them on June 12th, which was accepted, that we repurchase that loan. It went without saying that we repurchase it at its face. That was our intention, and that is what we did. There was never a word said about the price, but we made the proposition and the proposition carried with it the idea of paying 7 per cent. interest that they had been getting before. That is the regular rate all of their loans bear. There never was a word said on the subject, except this correspondence shows—except that they give us until September 15th to pay the principal, we paying part of it on June 12th, and when Mr. Guild was here, we explained that the banks had failed—it was after the banks had failed—and it would be a very hard thing for us to pay $50,000 on the 15th of September, without forcing somebody into bankruptcy; thereupon Mr. Guild made an agreement with us that subject to the approval of his directors, we were to pay the interest up to the 12th of September, and from that time we were to have a year's extension. My recollection is that the rate of interest was not discussed with Mr. Guild.

169 [—.] Then the first time you agreed to pay this interest was on the 12th of September—the first time you had any talk about it?

A. No sir, the first time we had any talk or agreement about it was at the time we took the loan. We knew we had to pay interest; they were not going to let the money run without interest.

Q. This note carried 10 per cent. interest, you stated, from maturity from June 12th?

A. The Gordon note did, but our indebtedness to Guild & Shepherd carried seven per cent. We assumed that was the case, and when we settled up, Mr. Guild said that we were to pay interest up to the 15th and then on from that time.

Q. When you agreed with Messrs. Guild & Shepherd to accept 7 per cent. instead of 10 per cent. from the 12th of June to the 12th of September?

A. That was in the latter part of August or the first part of September, when Mr. Guild was here, but I do not think we discussed the rate of interest. Before that time it was assumed that we were not to pay more than 7 per cent., we having repurchased. The 9 per cent. was fixed afterwards by a letter from Scotland.

Q. The agreement about 9 per cent. was afterwards fixed?

A. Yes sir, that was fixed by the directors of the Investors' Company in Scotland.

Q. And then you were advised of it by this correspondence, by the letters you had received?

A. Yes sir, giving the terms of their giving us a year.

Q. Do you mean to say then, that you had no con-
170 versation with Mr. Guild, or any one else, wherein it was agreed that you were to pay $50,000 with 7 per cent. interest up to the 12th of September?

A. No sir, to the best of my recollection I never had a word with Mr. Guild or any one else representing that Company, about what the rate of interest up to the 12th of September would be. We assumed that it was acceptable to the Scottish Company that we pay 7 per cent. up to that date, and we did pay it, and for this extension they insisted on 9 per cent— I explained why they did it, in their letters, that they would have to sacrifice some securities in order to give us that extension.

Q. You charged this interest up at 7 per cent?

A. Up to whom?

Q. On your loan book?

A. No sir, we credited Guild & Shepherd with 7 per cent. and took it out of our cash.

Q. You charged it up on the loan book at 10 per cent?

A. We charged Mr. Gordon 10 per cent.

Q. That is on page 375?

A. No sir, the charge of 10 per cent. [in] on page 42 I think.

Q. Mr. Hobson, I wish you would repeat the conversation as near you can, the conversation you had with Mr. Guild?

A. Do you mean in August?

Q. August or September. You said it was in September?

A. I said the latter part of August or the first of September. I cannot repeat it to you, Mr. Williams, because we had a very extended conversation about all of his loans. Mr. Guild
171 was over here inspecting the properties. He was around to a number of places in this country. We spent probably half a day in talking over the different loans that we made them. On the question of the Gordon loan I can tell you what the substance of it was. I explained to Mr. Guild the condition of affairs, and said to him that we agreed to repay this money on the 15th of September. It was with his firm that we had the correspondence and he knew of it, and gave him the reasons why it would be pretty hard for us to do it; in order to get the money we would have to press our customers, who were not in a condition to be pressed; and discussed the question generally with him. Mr. Guild recognized the force of the views, and as a result of the conversation we agreed upon a preliminary basis for the extension of the loan for a year. That our loan itself would run with our privilege to repay any part of the loan in a year. We had never given any note for the time, and I do not think that the question of interest was discussed with Mr. Guild at all. The question of interest came

up afterwards when they wrote us from Scotland that they insisted on 9 per cent.

Q. Then your obligation was to bear 9 per cent?

A. Our note was to bear 9 per cent; yes sir.

Q. Is it not a fact then, that you simply remitted without any negotiations whatsoever, and without any understanding or agreement with Mr. Guild, or the Scottish Company—you simply remitting $50,000 with 7 per cent?

A. We never remitted $50,000.

172 Q. I mean that you charged them with 7 per cent interest at the time you remitted $10,000?

A. After we arranged with Mr. Guild and heard from Scotland, we then remitted the interest to the 12th of June September, the quarter's interest, and sent on the $10,000, or we may have remitted the interest a little before that, whatever the correspondence shows.

Q. Have you introduced the letter Mr. Hobson, in which you made the remittance of this interest?

A. I think so, sir. This is on September 23rd. This sends the note and the $10,000 together. I suppose, Mr. Williams, that was the time we sent the interest.

Q. In this letter of September, 27th, which was addressed to Mr. Bell, by Guild & Shepherd, they say:

"On the 9th of August we sent you out the Gordon note endorsed to you as trustee. We presume you have endorsed on the note the $10,000 paid to account. The interest on this sum and the balance to be paid will be calculated afterwards and we presume you do not wish us to take off this sum the interest to date, but as to this perhaps you might write us. We shall be glad to hear from you."

Now what did you write to them in regard to that?

A. I do not think we ever wrote them anything on that.

Q. What was done?

A. The loan had been repurchased. They were mistaken about our endorsing on the note the $10,000 paid to account. At that time Cuyler, Morgan & Company had our note for $40,000, with all of this collateral. It was in New York. They simply got mixed up in the matter.

Q. Have you this letter of September 27th?

A. I cannot tell you that.

173 Q. Your files will show it, will they not?

A. I suppose so.

Q. I will ask you now if you will not produce the further correspondence on this subject?

A. But you can see this, we had sent some time before that, the $40,000 and all of this collateral to Cuyler, Morgan & Company, and they had it in New York, or Guild & Shepherd had it. We could not have endorsed the note,

Q. They distinctly refer in this letter Mr. Hobson, to the calculation of interest and the balance to be paid. As to that they request that you would write them. I request that you bring the correspondence relating to that.

A. As I remember Mr. Williams, this $10,000 was not paid until September 26th, and we added interest on that from September 12th to September 26th; we paid interest up to September 12th. We paid the $10,000 on September 26th, but we would have to pay interest on the $10,000 during that intermediate time, and that is what they refer to when they speak of endorsing the $10,000 on the note. We could not endorse it; Cuyler, Morgan and Company could endorse it. "Perhaps you might write us." What they meant by that, they did not wish to take it out of the $10,000. Interest on $50,000 from September 12th to the 26th, when we paid the $10,000, but wished us to pay the $10,000 on the principal and settle the question of interest afterwards.

Mr. Williams: We will ask the witness to produce the further correspondence bearing on this subject.

174 Q. Mr. Hobson, in this correspondence of Henry O. Morris about the 26th of July, you say: Your letter of 24th of July received, and "we will write Mr. Gordon at once and have a watchman placed at the house." I suppose that meant the hotel?

A. What date is that letter?

Q. July 25th.

A. Yes sir, that is my letter.

Q. Now was there anything done in relation to having a watchman placed at the hotel?

A. Not to my knowledge. I spoke to Mr. Gordon about it, Mr. Williams. We were under no obligation to pay the watchman at the house or putting him there. The policy does not demand it and Mr. Morris did not demand it. I spoke to Mr. Gordon and said he ought to put a watchman there, and I spoke to Mr. Gordon several times before that, as early as May when I first [first] discovered it.

Q. When you were in Pueblo on the 22nd of September was there a watchman on the place?

A. I think not, Mr. Williams, I do not think there ever was a watchman on the place after the work stopped, and I repeatedly asked Mr. Gordon to put a watchman there.

Q. You paid this premium on the Sun policy. Did Mr. Gordon ever pay you back for that?

A. Mr. Gordon ever pay us? No sir. We have received some payments on general account out of the insurance moneys collected.

Q. You charge this premium up to Mr. Gordon?

A. Yes sir; that is a condition of our deed of trust. We carried it into the general account.

Q. That was done in all these cases, was it?

175 A. Yes sir, that is the regular custom.

Redirect Examination

By A. C. Campbell, Esq.:

Q. Mr. Williams called you– attention to the letter of June 10th. I call your attention to a clause in that letter. I will just ask you to refer to it and explain the matter. You told Mr. Williams you would explain it if he desired it, and he did not seem to desire it.

A. I forget which clause it is.

Q. This of June 10th to Gordon. It is Exhibit 18 in the chancery case. This was the clause: "I have been instructed to take up the note held by our correspondent if desired so to do, and I have accordingly written to advise them of our intentions."

A. The explanation of that was simply that on the 9th when we had our meeting, or, rather when the members of the executive committee consulted, I explained to the executive committee very fully the condition of the loan and told them that Mr. Guild was coming over at an early date, and I was ashamed to have him know that there was such a loan on our books. I also told them about Cuyler, Morgan & Company's letter, and they approved of my intentions to buy up that loan so that Mr. Guild should not have a chance to go and see it and jump on us about the condition of it.

Q. Calling your attention to that part of the cross-examination wherein Mr. Williams referred to the letters which you had written to Benson & Kirtland, and their failure to reply,— I will ask you if you know from anything that you have heard from Mr. Kirtland or from Mr. Shepard why they did not

176 reply to your letters when you requested the itemized bill?

A. Yes sir, I heard Mr. Kirtland state in his testimony in the chancery case that he did not reply because he did not want to advise us of the condition of affairs—that as to several of our letters that he received Mr. Gordon asked him not to reply to them.

Frank B. Gibson, a witness produced, sworn and examined on behalf of the plaintiff, testified as follows:

Direct Examination.

By A. C. Campbell, Esq.

Q. Mr. Gibson just state your name and place of residence?

A. Frank B. Gibson; residence, Denver; occupation, assistant secretary and cashier of the International Trust Company.

Q. How long have you occupied the position of assistant secretary and cashier of the International Trust Company?

A. Since February, 1892.

Q. Mr. Gibson, you may state whether or not you ever had any interview or communication with Benson, Kirtland & Rice, or Mr. Benson, or Mr. Kirtland, or representatives of that firm, in Pueblo, Colorado. If so, when?

A. I had an interview on August 29th, 1893, with Mr. Shepard, in the office of Benson & Kirtland, in Pueblo.

Q. Who was in the office at the time, besides Mr. Shepard?

A. There was no one beside myself.

Q. How came you to go to the office of Benson & Kirt-
177 land at that time?

A. I went to Pueblo on the morning of August 29, in connection with a loan on the Mesa hotel property, and also in regard to the insurance on the property.

Q. Now what time of day did you go to the office of Benson & Kirtland, or Kirtland & Company?

A. I reached Pueblo about noon, or a little before noon, I think I made one stop for a few moments, as I recall it, at the American National Bank, and from there went directly to Benson & Kirtland's office.

Q. Well, now, just state what occurred?

A. I met Mr. Shepard in the hall-way—

Q. Well, you first tried the door, did you not?

A. I first tried the door, yes sir.

Q. Yes; well?

A. I found it locked. I had passed Mr. Shepard in the hall. He stopped and saw me try the door and asked, I believe, what I wanted. I told him who I was and what my business was.

Q. Who did you tell him you were?

A. I gave him my name, and told him, as I recall it, my position with The International Trust Company and stated the object of my call. He unlocked the door and returned into the office and I with him. I then referred to the policy which had expired on August 26th.

Q. Now, before we get to that, what, if anything, was said there with reference to his speaking for the firm or having authority to communicate with you in reference to insurance?

A. There was nothing said directly in regard to it. I simply asked him if he was connected with firm, or words to that
178 effect. He answered that he was. That was before we returned to the office.

Q. Well now, after he returned to the office what occurred?

A. I drew from my pocket the policy of insurance which had expired on August 26, 1893—just at this moment the name of the policy slips my mind.

Mr. Williams: Was it the policy of this Company?

The Court: There are two companies, the North America and the Sun.

Mr. Williams: We object to the testimony unless it was with reference to this insurance.

Mr. Campbell: We offer the testimony to show the authority of Shepard generally to transact insurance business in that office.

The Court: I do not think that is material.

Mr. Campbell: And this will be followed by other testimony showing that Mr. Kirtland afterwards said that whenever Mr. Shepard said to this man or to anybody else, with relation to insurance, was binding and that he had authority to say it.

The Court: We will pass this part of it and take Mr. Kirtland's statement unless it is confined to this policy; I do not care to try more than two law suits.

Mr. Campbell: Do I understand your Honor to rule the testimony out?

The Court: Yes, I will sustain the objection.

179 To which ruling of the court the plaintiff duly excepted.

Q. State whether or not you had any conversation with Mr. Shepard at that time with reference to the renewal of the policy of insurance.

Defendants object unless testimony is confined to this policy.

Q. With reference to the renewal of a policy of insurance?

A. We had a conversation with reference to that policy which expired on August 26th, which was the only policy I went to see him about.

Q. Now when were you next in the office of Benson, Kirtland & Co.?

A. I was there on the day after the fire.

Q. What date was that?

A. That was October 10th, 1893.

Q. Whom did you meet in the office at that time?

A. I met Mr. Kirtland first, and afterwards Mr. Shepard was called into the interview, and Mr. Rice, I believe.

Q. What if anything, was said with reference to your calling at the office on the 29th of August?

Defendants object.

The Court: I think that is merely preliminary. The objection will be overruled.

Mr. Williams: The testimony with reference to his call at the office, I understand was ruled out, and now he asks another question in regard to it.

The Court: No, it is in relation to some insurance policy that has been ruled out. He may answer this question.

To which ruling of the Court the defendants duly excepted.

A. I referred to the call at the office at that time.
180 Mr. Kirtland seemed to know nothing of my having called on August 29th.

Q. Now on the 10th of October, 1893, when you were there and had this interview with Kirtland, state whether or not you were there with reference to this North American Insurance matter.

A. Yes sir, I was there to ascertain in regard to the entire amount of insurance that was carried on the Mesa Hotel.

Q. Did you make a memorandum of what occurred there at that time?

A. I did.

Q. When did you make it?

A. The memorandum was made on the following day on my return to Denver.

Q. Now who was present at that conversation?

A. Mr. W. G. Graham, the president of one of the national banks in Pueblo.

Q. I will hand you a paper and ask whether that is the memorandum you made?

A. This is the memorandum which I dictated, yes sir.

Q. Now when you called there on the 10th of October, 1893, with reference to this policy in controversy, what was said? Just give the conversation, what was said by you to Mr. Kirtland with reference to Shepard's authority and his having power to make contracts, &c.

Defendants object.

The Court: He may answer the question. I do not care about any details. If there is any statement as to the general authority to issue insurance, that may be answered.

To which ruling of the court the defendants duly excepted.

A. I asked Mr. Kirtland in reference to the Norwich
181 Union policy. He claimed that it was not in force. I then referred to our conversation of August 29th, between myself and Mr. Shepard, in which Mr. Shepard had assured me that that policy was in force and that we were covered by it; and following that I asked Mr. Kirtland if Mr. Shepard was not a responsible person representing their firm—

Defendants object because irrelevant and immaterial.

Objection overruled. Defendants except.

A. He stated that Mr. Shepard was; that he had been with them a long time; that he was their clerk and confidential man, and I think I use his exact words in saying that he would not go back on anything that Mr. Shepard said or did.

Q. What conversation occurred there between you and Mr. Kirtland with reference to the policy in controversy of the North America Company?

A. I inquired about that particular policy and he stated that it had been canceled; that he had so notified Mr. Gordon. I asked him if it was the custom of their office to cancel policies without notification to the mortgagee or trustee where there was a loss clause attached. He stated that he had notified Mr. Gordon and that he supposed that was sufficient, although perhaps he should have notified the mortgagee also.

Q. Now what was said at that time with reference to the amount of insurance that his agency held on the Mesa hotel property?

Defendants object because immaterial.

The Court: I cannot see what possible bearing that
182 can have. I will sustain the objection.

To which ruling of the court the plaintiff duly excepted.

Cross-Examination

By S. G. Williams, Esq.:

Q. Mr. Gibson, on October 10th, when you say you had this conversation with Mr. Kirtland relative to an interview which you then claimed that you had had with Mr. Shepard regarding the policy which expired August 26th in the Norwich Union Society,—you say that Mr. Kirtland told you at that time that they would back up whatever Mr. Shepard said or did. At the same time did he not repudiate altogether that policy of the Norwich Union and the acts of Mr. Shepard?

A. He simply stated that they never considered that the Norwich Union policy was in force,

Q. And that they would not consider it in force?
A. He did not say that.
Q. And you asked him if he did not consider it his duty to issue that policy, and he said no, that it would be absurd to ask him to do that thing?
A. I have no recollection of any such language as that.
Q. Now you testified, did you not, Mr. Gibson, in the case of The International Trust Company against The Norwich Union Society?
A. I did; yes sir.
Q. And you testified to those same conversations, didn't you?
A. I did.
183 Q. Now, at that time, you made in substance the same statement that you have now made in regard to Mr. Kirtland's assertions relative to Shepard, didn't you?
A. Yes sir.
Q. And at that time I asked you substantially the same question that I have now asked you, in regard to Mr. Kirtland's repudiating Mr. Shepard's action, and you stated at that time that you could not reconcile those two statements, didn't you?
A. Yes sir, I think I did.
Q. Now, how do you reconcile them now?
A. I do not attempt to reconcile them. The fact that Mr. Kirtland had stated that the Norwich Union policy was not in force, as they considered it, was what [lead] me to ask if Mr. Shepard was not responsible.
Q. Yes, and at this same time when you say that Mr. Kirtland was admitting Mr. Shepard's authority, he was denying his authority, was he not?
A. I leave that for your own construction. I am giving the conversation as it occurred.
Q. And you could not reconcile his statements?
A. That is rather difficult.
Q. And you have testified to that, and testify to it now—have you not?
A. Yes sir.
Q. Mr. Kirtland did not say to you that Mr. Shepard had ever issued or made a contract of insurance, did he?

The Court: That is not cross examination, Mr. Williams, at all.

184 There has been no testimony showing or attempting to show by this witness that he made any such statement. You may use him for your witness if you want to on your side of the case, but we will try one side at a time.

Mr. Williams: I understand that the testimony was that he tried to show the authority of Shepard to make contracts.

Mr. Campbell: Why, Mr. Kirtland stated to this witness that whatever Mr. Shepard said he would stand by and would not go back on it.

Q. Mr. Gibson, at the time you called there on the 10th of October, just state whether or not Mr. Kirtland did not say that they had refused to recognize that Norwich Union Policy because it had never been delivered.

Plaintiff objects because immaterial and irrelevant.

Objection sustained.

To which ruling of the court the defendants duly excepted.

John R. Gordon, a witness produced, sworn and examined on behalf of the plaintiff, testified as follows:

Direct-Examination

By A. C. Campbell, Esq.,

Q. State your name and place of residence.
A. John R. Gordon; Pueblo, Colorado.
Q. State whether or not you were the owner of the property known as the Mesa Hotel property, in Pueblo, Colorado, in December, 1892?
A. Yes sir.
185 Q. You are the party who negotiated the loan with the International Trust Company?
A. Yes sir; I negotiated with them for a loan.
Q. You were acquainted with the Company's agent there—with Benson, Kirtland & Rice?
A. Yes sir.
Q. Did you know a gentleman connected with that office by the name of Shepard?
A. Slightly, yes sir.
Q. How long had he been in that office?
A. I could not say.
Q. Prior to that time?
A. Prior to that time, though I saw him in the office; prior to the time that the loan was negotiated.
Q. You had considerable insurance transactions with this Shepard, had you not?
A. Yes sir.
Q. He was in charge of the business of the office of Mr. Kirtland and transacted business in the office with customers who came there?
A. I think that Mr. Shepard was considered the office man; the other men were out on the street, more or less, but he did the office work.

Q. State whether or not you ever got any policies and whether he ever delivered any policies of insurance to you on this or other property.

A. I think he did. I am not positive on that point, though. I think that Mr. Shepard has brought policies to my office or handed them to me—at least he has handed policies to me to look at. I remember such policies as that, but I think he has handed me policies after writing them.

Q. At the time that this property was destroyed what was the value of the improvements that were upon the property and covered by this policy of insurance of the North America Company and the Sun Fire Insurance Company?

A. At least $100,000.

186 Defendants object until it is shown that witness knows the value.

The Court: You can show that he does not know anything about it if you want to.

Mr. Williams: We have an objection on that point of value that we desire to offer. We object to the introduction of any evidence whatever in regard to the value or amount, of loss, because the policy provides that that must be determined by an arbitration or appraisement, as a condition precedent, and it is incompetent to prove in this action the value independent of the appraisement, unless it be shown that the appraisement was waived.

The Court: I think your objection will be overruled. I quite agree with Mr. Smith, however, that this man's testimony on that question will be much more valuable if they show he is qualified to testify.

To which ruling of the court the defendant duly excepted.

Q. Who furnished the money that went into this building that was destroyed?

A. The money was furnished by a number of persons, including myself. I furnished a large part of it.

Q. How much money had been expended on this building before it was burned down?

Defendant objects because it is not the way to prove the value of the property.

A. More than $100,000.

Q. More than $100,000 had been expended?

187 Defendant moves to strike out.

The Court: No, let it stand.

To which ruling of the court the defendant duly excepted.

Witness here described building and its construction in detail, and testified that he had built quite a number of residence buildings, and had had experience for four or five years in constructing buildings at Pueblo, and had personally supervised the construction of the Mesa Hotel building. That the value of the building at the time of the fire was $100,000. That there was nothing of value left after the fire. That the condition of the building at the time of the fire was practically the same as in July, 1893.

Henry W. Hobson, recalled for further cross examination, testified as follows:

Cross-Examination

By S. G. Williams, Esq.

Q. Mr. Hobson, did you get those letters that I called for yesterday?

A. I have the letter book here up to December 22, 1893.

Q. When was your final settlement made with the Scottish Company?

A. On January 5th, I think, sir. That was when the note was paid.

Q. This book then, that you have, does not show all?

A. No sir, I have another book here. I have it all here now, Mr. Williams. The letter which you asked me about was the letter of September 27th, I think.

188 Q. The last letter was September 27?

A. Yes sir, and we have no answer to that letter whatever and the next letter we wrote to Guild & Shepherd upon the subject, on this matter, at all, was on October 31st, 1893—there were letters between that time, but there was no reference to this matter, in which we say that we think if we get in some money that we are promised in a few days we may pay them $10,000 &c., if agreeable to them; it is as follows:

"If we get in some money that we are promised during the next thirty days, we may be able to pay you anywhere from $10,000 to $25,000 upon the $40,000 now due. Upon the terms of our note, we are entitled to make payments at the end of every three months, but we would like to do so before that time if agreeable to you. Upon receipt of this please wire simply "Yes" or "No" as you may wish, and if "Yes" notify Messrs. Cuyler, Morgan & Company, New York, to receive payment from us and credit. I do not mean to say now positively that we will be able to make payments but hope so."

The next letter we wrote them on the subject was this of Nov. 25th, 1893.

"In accordance with our letter of recent date, proposing to pay something on account of our note to you, and your telegram agreeing to the same, we have this day remitted to Messrs. Cuyler, Morgan & Company $10,000 to be applied upon our note, and we also remit interest coupons upon the Stewart and Nichols notes, due this month, as per enclosed statement. We hope to be able at an early date to reduce our loan still further."

The next letter is December 18th, to Guild & Shepherd, in which we say:

"There is a probability that with a little extra strain, we could pay off the balance of our note with you $30,000 within the next thirty days, and I write to ask whether you would be willing, in case we did so, to let us reloan the amount
189 out here in first class real estate loans, to be subject to your approval. I think under all the circumstances that this would be but fair, and it would be quite an inducement to us to strain a point if this arrangement could be made. Times are looking a great deal better here, and the worst is now over. Please let me hear from you upon this subject at an early day."

Those are all the letters until—here is a letter showing the full settlement, Mr. Williams, if you wish to have that. On January 2, 1894, we wrote Guild & Shepherd as follows:

"In a few days we hope to be able to pay the balance of the $30,000 due you on account of the Gordon loan with interest to date of payment. We have already paid as you know, $20,000, and we will calculate interest on $40,000 from September 12th, to which date we paid interest in full, to the date of the first payment, and on the balance to the date of the last payment. We wrote you recently about reinvesting this money out here and are in hopes that you will consent to do so."

On January 4th we sent this cablegram, of which this is the translation: "Will you accept payment in full note $30,000." You must bear in mind that we had the right on the note to pay it off any three months. We received a cablegram that they would accept, and on January 6th we wrote as follows to them:

"Yesterday we remitted to Cuyler, Morgan & Company, New York, for your credit, $31,632.60 as per enclosed statement. You will notice we have allowed interest on the balance of the $40,000 note to Jan. 9th. We have requested Messrs. Cuyler, Morgan & Co. to return to us the $40,000 note along with the collateral attached * * * "

And then the balance refers to other loans. The statement which we sent is as follows:

"The Investors Mortgage Security Company, Limited, in account with The International Trust Company, Denver,
190 Jany. 5, 1894. Badger's interest due 1 Jany. $420; Porter's interest due 1 Jany. $40; (Porter's coupon called for $160 of which we get $20) Balance of our $40,000 note dated 12 Sept. 93, 9 per cent. $30,000. Interest on same to 9th Jany. $1072.60," making $31,632.60. Those other remittances—they included $420 and $140 interest on other loans. "Above amount remitted Cuyler, Morgan & Co. this day." That closed the transaction.

Q. After the 27th of September you had no further correspondence or communication with the Scottish Company relative to this matter of interest, which is mentioned in the letter of September 27th?

A. Not at all, sir; it never was mentioned except in paying the interest, as I have read you in these letters; never was mentioned.

Q. When did you pay the $875 accumulated interest from June 12th to September 12th?

A. My recollection is that we paid it the day we sent the note. I think we credited it up on our books. We carry a running account with the Investors' Company.

Q. That was the 24th of September?

A. Yes sir; but it was during the month of September. We carry a running account; where we have small amounts we collect and carry to their credit, and occasionally we make a remittance where there is a large amount, to Cuyler, Morgan & Company.

The Court: We went over that matter yesterday, did we not, Mr. Williams? You referred to this eight hundred and some odd dollars, from June 12th to September 12th.

Q. We left off with this letter of September 27th in
191 which the Scottish Company write that the

"Interest on this sum and the balance to be paid, would be calculated afterwards and we presume you do not wish us to take off this sum the interest to date, but as to this perhaps you might write us. We shall be glad to hear frm, you."

That is what I am inquiring about?

A. That refers to the interest from September 12th up to the date when we paid the $10,000, Mr. Williams. The $875 was paid during the month of September. I do not remember just the day.

Mr. Campbell:

Q. Your firm instituted this suit did it not; filed these suits?

A. Yes sir.

Q. State whether or not the suit was commenced before or after the expiration of the 60 days from the furnishing of proofs of loss in this case?

A. They were furnished more than 60 days; more than 90 days, if I remember correctly.

Q. Before the suit was brought?

A. After we furnished the proofs.

Mr. Willlams:

Q. I will ask you if it was not within less than 30 days after your amended proof of January 16th?

A. We never filed any amended proofs, Mr. Williams.

Mr. Campbell: I object. I asked him nothing about that.

William F. DeCamp, a witness produced, sworn and examined on behalf of the plaintiff, testified as follows:

192 Direct Examination

By A. C. Campbell, Esq.

My name is William F. DeCamp; residence, this city; am fifty-two years old; am a superintendent of buildings, in the construction. Received my Master's certificate in 1873. Came to Denver in 1883. Have superintended buildings in this city and around here for seven years. Have been a boss for the last 18 years. I made a thorough examination of the Mesa Hotel building in July, 1893. Spent four days there.

Witness then gave in detail the construction of the building and the materials therein, and being further interrogated testified that the value of the building at that time was $130,000, or more; that witness saw what was left of the building in December, 1894.

Q. What would be your estimate of the value of the stone there, that was in the building?

A. A total loss.

Defendant objects to this witness testifying as to the extent of the loss, upon the same ground that is objected to Mr. Gordon yesterday; that the only competent evidence is the appraisement or the agreed ascertainment of the loss between the parties.

Objection overruled.

To which ruling of the Court the defendant duly excepted.

Witness: The walls and foundations after the fire could not be used in the erection of another building. The foun-
193 dation might be made to carry a smaller building, but it would cost more to clean it out than it is worth.

A. J. Beaumont, a witness produced, sworn and examined on behalf of the plaintiff, testified as follows:

Direct Examination

By Mr. A. C. Campbell, Esq.

I have resided at Pueblo for fourteen years. Am very well acquainted with the Mesa Hotel property. Its relative condition in July, 1893, was about the same as at the time it was burned I saw the fire when it first started. Saw the property after the fire. Nothing was left of the buildings but the scarred burned brick, and even the granite columns were burned down from four feet around to about 18 inches.

John H. Kirtland, a witness produced, sworn and examined on behalf of the plaintiff, testified as follows:

Direct Examination

By A. C. Campbell, Esq.

My name is John H. Kirtland; residence, Pueblo, Colorado; business, insurance. Have been in the insurance business in Pueblo in the neighborhood of eight years. Was the agent of defendant, the Insurance Company of North America, in 1893.

From 1st of January, 1892, to 1st of January, 1893, Mr.
194 Rice was associated with me in business, under the firm name of Benson, Kirtland & Rice; Mr. Benson having no interest in the agency; his name simply appeared in firm name. From January 1st, 1893, to 1st of July I was alone, and from that time on Mr. Hill has been associated with me. As agent of defendant I had authority to issue policies. Blank policies were furnished me. I delivered policies to applicants upon their application and my countersigning. It was my duty to report fire risks immediately to the company, considering instructions given me by the company. I issued policies without referring to anybody else. The blank policies furnished were signed by the officers of the company all ready to deliver upon being countersigned by me as agent, after being filled up.

Cross-Examination

By S. G. Williams, Esq.

Q. You do not mean that they were ready to deliver unless they were filled up?

A. Certainly not. Certainly. That, of course, is understood.

And thereupon the defendant, to sustain the issue on its behalf gave in evidence as follows, that is to say:

Under the stipulation permitting the use of the abstract of title defendant introduced and read in evidence abstract of title entry No. 3, to-wit: Conveyance from John R. Gordon to the Mesa Hotel & Improvement Company, recorded in Book 118, page 580. A deed dated July 3, 1893; consideration, one dollar and other valuable considerations. Filed for record July
195 3, 1893, before Albert L. Murray, a notary public, Pueblo, Colorado. Conveys lots 11 to 16, block 126, as shown on the original plat of the former city of South Pueblo, Colorado, and now a part of the City of Pueblo, as the same is now on file in the Clerk and Recorder's office of said county; subject to whatsoever equity or legal encumbrances are upon the records against said property. Also entry No. 4, Mesa Hotel & Improvement Company; No. 65,845. Certificate of Incorporation, dated 14th of June, 1893; §filed June 20, 1893. Acknowledged June 14th, 1893, before W. F. Townsend, Pueblo, Colorado, under the laws of the State of Colorado, &c.

Said abstract is thereupon marked exhibit 32.

We also offer Exhibit No. 27, being proof of loss, identified by John R. Gordon, for the purpose of further identifying this property, as sold on the 3rd day of July, 1893, a statement to which effect is contained in this proof of loss.

Mr. Campbell: We object as there is no issue here. We do not contend that he has any interest, or can recover on this policy.

The Court: Well, I will allow the abstract and proof of loss to go in. You can put it in, Mr. Williams.

To which ruling of the court the plaintiff duly excepted.

Mr. Williams: I will read from the proof of loss:

"Until the 3rd day of July, 1893, the undersigned held in his own name the equity to all of said property so covered and insured by said policy, his right being subject only to the
196 deed of trust in favor and for the benefit of the International Trust Company, as herein mentioned. On or about the date aforesaid, for good and sufficient reasons, the undersigned organized a company known as The Mesa Hotel and Improvement Company, the capital stock of which was and is practically controlled by the undersigned, upon the organization of which said company the title to said property was transferred to it; said transfer, however made no real difference in the ownership and title to said property, as the same rights existed with regard to the same after the transfer to the said company as before,"

as identifying this property as the property which was insured.

M. V. B. Benson, a witness, produced, sworn and examined on behalf of the defendant The Insurance Company of North America, testified as follows:

Direct Examination

By S. G. Williams, Esq.:

My name is M. V. B. Benson; age 52 years; residence, Denver; business, insurance. Am and have been State Agent for Colorado for defendant, The Insurance Company of North America, from July 1st, 1892, to date. All local agents are appointed by the General Agent, upon my recommendation. Benson, Kirtland & Rice, were local agents at Pueblo, Colorado, from January, 1892, to January, 1893. John M. Kirtland and Ward Rice were the members of the firm. From January, 1893, until July, John M. Kirtland was agent. From July 1st, 1893, till the present time, John M. Kirtland was agent, C. S. Hill being associated with him. The persons men-
197 tioned were the sole agents for the defendant at Pueblo, during the period mentioned. I was in charge of the adjustment or investigation of the loss on the Mesa Hotel. The matter came into my hands immediately after the fire. Until after the fire I had no knowledge, whatever, nor did the defendant company, of the transfer of the property in question from John R. Gordon to the Mesa Hotel & Improvement Company, nor of the sale or transfer of the Gordon note from the International Trust Company to other parties, nor of any negotiations relating to the repurchase of that note.

The paper [hands] me (Exhibit 21) came to me from The International Trust Company, by way of the General Agents. It was received I think, about January 24, 1894.

Paper here offered in evidence, being the amended proof of loss, dated January 16th, 1894.

Objection by plaintiff, on the ground that the paper was received after the expiration of the 60 days from the furnishing of the proofs of loss which have been introduced, and there is no evidence that they objected in any way to those proofs of loss; and second, having pleaded to the merits in this case, they can raise no issue here that this suit was not brought in time, that being a plea in abatement; further, it is immaterial and irrelevant.

Objection overruled. To which ruling of the court the plaintiff duly excepted.

198 Witness: That is my signature to the letter handed me. The letter is from me to The International Trust Company, under date of January 20th, 1894.

Letter marked Exhibit 33 is here offered in evidence for the purpose of showing the nature of the negotiations relative to the adjustment of the loss and the position taken by the defendant company with respect to the matter of liability, communicated to plaintiff; and to show the offer of defendant to return the premium on the policy.

Mr. Campbell: We admit the tender of the premium as claimed by counsel for defendant.

Said letter, Exhibit 33, is then introduced.

Letter of January 23rd, 1894, Exhibit 34, introduced.

Letter of January 27th, 1894, Exhibit 35, here introduced, being letter from J. F. Downing, General Agent of Defendant Company, to H. W. Hobson, vice-president of plaintiff company.

The witness Benson, being further interrogated, testified as follows:

Q. Mr. Benson, please take this policy, Exhibit 6, with the mortgage clause attached, and state whether or not you are familiar with what is known as the Standard or Union mortgage clause?

A. I am.

Q. Are you familiar with the usages of current underwriting regarding the use of the mortgage clause in insurance?

A. Yes sir.

Q. I will ask you, what is the usage, and what is particularly the usage with The Insurance Company of North
199 America, in practice, relative to the use of the mortgage clause, as to the form of mortgage clause which is used.

Plaintiff object to stating what the [usuage] is.

The Court: I think the objection is well taken, Mr. Williams. We must determine this case by the mortgage clause attached to the policy—unless you deny that was attached by the company—and will undertake to say what that mortgage clause means.

Mr. Williams: I desire, if the Court please, to offer this testimony for the purpose of showing that the mortgage clause used in this particular case is not the mortgage clause which is used in current underwriting with respect to certain particulars which are material to the issues. That is a mortgage clause which is prepared by The International Trust Company with respect to those particulars—the evidence offered relates to the construction which is to be placed upon this instrument, as to whether it is to be construed against the Insurance Com-

pany, as their instrument, or whether it is to be construed against The International Trust Company, as their instrument.

The Court: No, I think, Mr. Williams, we must take the contract entered into in the case and attempt to find out what it means from its language. The court will be glad to have the aid of your views as to the proper construction, when you come to argue the case; but I do not care to have the witness on the stand discuss the facts.

200 Mr. Williams: I propose to have the witness to testify as to the common use of this clause.

The Court: The common use does not make any difference. They may have in this special case made a special contract. The particular contract must bind. I do not want the witness to undertake to construe the contract from the witness stand.

Mr. Williams: I have another witness, however, that I will question on that. I desire to make the tender of the evidence in view of particular decisions of our Court of Appeals, and I will present the matter a little more fully when I call the other witness.

The Court: My ruling casts no reflection on your witness, but what I wish to say is, that the court must go by the contract and not by the witness.

Mr. Williams: It only goes to the [usnage] in respect to the mortgage clause.

The Court: It finally results in his opinion as to the mortgage clause, and that he must not construe. We must take this particular mortgage clause, and the court will construe it and endeavor to get it right. To which ruling of the Court the defendant duly excepted.

Witness: I was frequently in the office of our local agent at Pueblo; was and am acquainted with Mr. Shepard. Mr. Shepard's connection with that office was simply as a clerk,
201 so far as I know. I am testifying from my own knowl edge. I was not connected with the office in any way. Mr. Shepard had no connection whatever with the Insurance Company of North America, except as a clerk of our local agent.

Cross Examination

By A. C. Campbell, Esq.

That is my signature to letter handed to me. It is a letter addressed to John R. Gordon, in relation to this insurance in controversy.

Said letter introduced by plaintiff and marked Exhibit 36.

I have examined the Exhibit handed to me, sent by Henry W. Hobson on January 16th, 1894, in which he calls attention to the Alliance insurance policy for $10,000, having been an error in the former proofs. I did not have knowledge prior to this notice being served upon me, that that Alliance policy of insurance was not an existing, live policy upon the Mesa Hotel. I had that policy in my possession prior to the fire. I offered to return it to Mr. Gibson on the morning of the fire. I did not receive a telephone message from Mr. Kirtland on the morning of the 9th of October, 1893, before the fire, to return that Alliance policy to him. I received the telephone message about 10 o'clock during the forenoon—10 or half past 10. I do not know that the fire did not take place until 11 o'clock that day. I received a telephone message direct from Mr. Kirtland; recognized his voice. After that I did go to
202 the office of the International Trust Company and offered them this Alliance policy. Well, I cannot remember whether Mr. Kirtland telephoned me to return that policy or not—whether it was after the telephone communication with Mr. Kirtland that I offered that policy to Mr. Gibson. I think I went to the office of The International Trust Company—well, immediately after that telephone message. I cannot designate just the hour. As I remember, as a ground or reason that he desired me to return that policy of the Alliance Company, Mr. Kirtland stated that they had placed a double line in the Alliance Company.

Q. And notwithstanding the fact that you had instructions from Mr. Kirtland to return that policy, you went down and offered it to The International Trust Company.

A. I think I did not consider the instructions of Mr. Kirtland binding on me.

Q. You were not agent for the Alliance?

A. No sir.

Q. You were agent for the North America Company?

A. Yes sir. This policy was given to me by Mr. Kirtland with instructions to take it to The International Trust Company and replace the North America policy with that, for the reason that Mr. Gordon had had notice for several weeks before that, at sundry times, that the North America policy was canceled.

Q. And when you took that to The International Trust Company you took it for the purpose of exchanging it for the North America policy the one in issue here?

A. Yes sir.

Q. And you demanded the North America at that time?

A. Yes sir, I did.

203 Q. And Mr. Gibson refused to give it to you?
A. Yes sir.
Q. Now Mr. Benson, was there a mortgage clause attached to that policy that you offered to Mr. Gibson?
A. That I could not say.

Redirect Examination

By S. G. Williams, Esq.

Witness: Prior to January 16th, at which time this amended proof of loss was made, I had received on behalf of the Insurance Company of North America a proof of loss in which The International Trust Company claimed to hold that Alliance policy as a valid and subsisting insurance. Prior to the 16th of January I had not been informed or notified by The International Trust Company that they relinquished or ceased to make a claim under that Alliance policy.

John M. Kirtland, a witness produced, sworn and examined on behalf of the defendant, testified as follows:

Direct Examination

By S. G. Williams, Esq.

As a local agent of the Insurance Company of North America I had charge of the transactions relative to the Mesa Hotel up to the time of the fire. No one else had any connection or charge of that matter further than clerical work was concerned. I had no knowledge whatever of the transfer of the hotel property from John R. Gordon. I had no knowledge of that transfer at the time the premium was paid. I had no knowl-
204 edge relative to the ownership of the Gordon note, aside from the way it appeared in the policy. Had no knowledge in regard to it at the time the premium was paid. The first knowledge I had of it I think, was during the previous trial in the Norwich Union case.

The circumstances under which the policy in suit was signed on the 26th of June and the reason it was signed on that date, is that it has always been the custom of the office for the clerk to fill in expiring policies some time previous to the time of issue, simply in memoranda. The custom of the office for the last five or six years, ever since I have been connected with it, has been, about the middle of the month we begin to fill up policies in memoranda of those expiring during the following month. That explains the reason for this countersigning on the 26th of June. The occasion and purpose of filling up those policies in advance is simply that they may be placed in my possession for attention at the proper time. There was no negotiation had relative to the issue of this policy on June

26th. There was no contract whatever or agreement made by me as agent, or made on behalf of the Insurance Company of North America, with either Mr. Gordon or The International Trust Company, aside from that shown in the policies? That would be beyond my authority to make any agreement regarding a contract for the future. This insurance transaction relative to the Mesa Hotel was had with John R. Gordon. I treated with John R. Gordon the assured. My negotiations with him dated a short time prior to the issue of the first policy
205 on the hotel, which was, I think, in 1892—(consults book) July 6th, 1892. The premium was paid by the International Trust Company, I think, at the request of Mr. Gordon. That is my supposition of it. I had the account for the premiums with John R. Gordon, the assured. I do not remember the date at which I learned that The International Trust Company would pay, or had consented to pay the premiums, but Mr. Gordon told me he had made some arrangements with them to advance the money for him. That was prior to any correspondence had with me or which I had with The International Trust Company. I do not know anything from my own knowledge of the arrangement made between The International Trust Company and Gordon relative to the payment of the premium.

Q. Mr. Kirtland, who countersigned the policies for The Insurance Company of North America?

A. I did.

Q. Who countersigned the policy in suit?

A. I did.

Q. Did Mr. Shepard countersign these policies at any time?

A. No sir, he had no authority to sign policies.

Cross Examination

By A. C. Campbell, Esq.

Q. Mr. Kirtland, you say that you had no transaction with any person but John R. Gordon relative to this insurance. Didn't you write to The International Trust Company, asking them for the premium?

A. Yes sir, at the request of Mr. Gordon.

206 The Court: Is that the correspondence offered here yesterday?

Mr. Campbell: Yes sir.

The Court: It is not necessary to read it again.

Q. Were you not carrying this insurance in the North America Company for The International Trust Company, and

didn't you so recognize it that you were so carrying it for The International Trust Company?

A. No sir.

Q. Calling your attention to a letter that was introduced in evidence yesterday, being Exhibit 17 in the chancery case. I will just read you this portion of that letter:

"You ought by this time to be thoroughly satisfied that the policy is renewed and in your possession. The other policies are still in force and will remain in force until notified to the contrary."

That letter was addressed to John F. Bell, and was in relation to the North America policy. You wrote that letter?

A. I wrote that letter. I have not seen it, but I presume that is the one I wrote, yes sir.

Q. Can you say that you did not recognize any interest whatever of The International Trust Company in relation to this policy?

A. No sir.

Q. You did not?

A. No sir; my understanding was simply that the International Trust Company were only interested in case of a loss.

Q. Did you write this letter of September 18th, addressed to Henry W. Hobson, being Exhibit 18 in the chancery case?

A. Yes sir.

Q. "Your letter of 9/16 received, and in reply will
207 say that we will do our best to carry the hotel insurance for you, will at least keep you covered under the policies you now have until you come to Pueblo, and trust that some arrangement can then be made for the payment, as our companies are crowding us for the money."

Now how do you reconcile that letter with your statement that you did not recognize the International Trust Company had any interest in this policy, when you say you will keep us covered on them?

A. I presume that letter was written replying to the letter from the Trust Company regarding the insurance, and it does not refer especially to the Trust Company, but refers to this—

Q. What do you mean by saying "We will do our best to carry the hotel insurance for you"?

A. Well I meant what it says there.

Q. You meant you would carry it for the Trust Company?

A. No sir.

Q. Why didn't you say so then?

A. Because it was unnecessary to say so. I might say in explanation of that letter that it is always understood that under the subrogation clause of policies the parties are only interested in the policy in case of loss, as their interest may

appear at the time of the fire. The subrogation was put on the policy at the request of Mr. John R. Gordon.

Q. You did not answer all the letters that The International Trust Company wrote you, did you?

A. I did not.

Q. Why didn't you?

A. Mr. Gordon requested me to leave the matter in his hands; that he preferred to attend to it himself, and as I was doing business for Mr. Gordon and especially interested in him, I of course, acceded to his wishes.

Q. They wrote you to send them an itemized bill for
208 the insurance on that hotel property?

A. I think they did.

Q. And you failed to reply to that letter, did you not?

A. My recollection is that I had a special request at that time from Mr. Gordon not to do so, and therefore I did not.

Q. Didn't you refuse to do it so as to keep The International Trust Company in the dark as to the transactions with Gordon?

A. No sir.

Mr. Williams: We object to this examination in regard to the premium, as immaterial. We admit the premium was paid by The International Trust Company. There is no question about that.

Q. You testified in the Norwich Union case, did you not?

A. I did, yes sir.

Q. Didn't you testify in that case to the following effect:

"They requested me to send them an itemized bill of account. I knowing that Mr. Gordon did not wish to have me to do that, called upon him and told him the substance of the letter I had received, and he [imsisted] again that I should not send them an itemized bill of account, because it might compromise him in some way, and he preferred not to have it, and asked me to pay no attention to it, and not send it, and in fact, urged me not to send it, and I therefore paid no attention to it, as was also the case with other correspondence received from The International Trust Company regarding the insurance upon this property."

You testified to that, did you not?

A. I think so.

Q. Didn't you also testify in that case:

"Mr. Gordon made frequent requests that I should not reply to their correspondence, because he preferred to handle the matter himself; he said that his loan was in bad shape, that he was trying hard to get some more money and that if The Inter-
national Trust Company found out that there was any
209 trouble with the insurance, it would interfere with his plans, and that he preferred to talk with them about it

personally rather than to have me write them, and therefore in violation of the regular custom of our office to answer correspondence promptly we complied with his request and made no reply to the correspondence received from that office. We were writing insurance for Mr. Gordon and as far as we were concerned The International Trust Company was only interested in case of loss, and then as their interest might appear, we therefore felt that we were under obligations to the assured rather than to any one not having a direct interest in the policy."

You testified to that did you not, in that case?

A. Yes sir.

"Q. Didn't you also testify in that case, after I had handed you some letters and I asked you to look at those letters, the one marked Exhibit 29, letter dated July 6th, and didn't I ask if you received that letter, and didn't you say that you had?

A. You can answer that question better than I can. You have the testimony there and can see what it is.

Q. Now I will read you this testimony and ask you if that was not testified to in the Norwich Union case:

Q. "Look at this letter marked Exhibit 29 of the plaintiff's proofs the letter dated July 6th, from F. B. Gibson; did you receive that letter? A. Yes sir. Q. Look at this letter which is marked Exhibit 30 of the plaintiff's proofs, dated July 22nd, signed by John F. Bell; did you receive that letter? A. Yes sir. Q. And look at Exhibit 31, letter dated July 26th, signed by John F. Bell, secretary; did you, receive that letter? A. Yes sir. Q. Did you reply to those letters, Mr. Kirtland? A. No sir. Q. Referring to your letter of Aug. 5th, will you say what that letter refers to: "Your letter of some date received and contents noted." A. That is the 4th. Your letter of Aug. 4th. Q. Why did you not answer
210 those letters, Mr. Kirtland. A. Because Mr. Gordon had requested me not to reply to them. I received considerable correspondence from the International Trust Company, and as he had requested me to submit it to him, I did so, and he insisted that I should not reply to them, and explained as the reason that he preferred to handle the matter himself, and that he was then making negotiations with them for an additional amount to carry on the building of the hotel, and that he was afraid something would happen to interfere with those negotiations if they should know that there was a question whether the companies would carry the insurance or not; that they would at once foreclose the loan and it would interfere with his getting more money, which he hoped they would be able to let him have, and he insisted very emphatically at several different times that I should

not reply to their correspondence regarding the insurance, and of course I complied with his request, as I was doing business for him and not for The International Trust Company."

Was not that testified to on the former case, by you?

A. Why I suppose so. I cannot remember everything I said in the former case. I cannot tell whether I testified to all of that or not.

Mr. Williams: I do not see the purpose of this cross-examination.

The Court: I do not see the purpose of going into this question.

Q Mr. Kirtland, in relation to Shepard, you say Shepard did not have any authority to countersign policies in your office.

A. No sir.

Q. Who had charge of the office when you were absent? Did he not?

A. He had charge of the clerical work of the office, yes sir. He was the clerk.

Q. Now you remember Mr. Gibson being present in your office on the 10th of October, 1893?

A. I remember Mr. Gibson calling there after the fire. I do not remember the exact date now.

211 Q. Now didn't you say at that time when Mr. Gibson called your attention to what Shepard had done on the 29th of August, that anything Mr. Shepard did, you would stand by?

A. I may have said so; it would be very natural for me to make a statement of that kind.

Q. And didn't you so testify in the former case of the Norwich Union?

A. I cannot remember just what my testimony was, bu t I am willing to stand by it whatever it was.

Defendants object because immaterial.

The Court: No, that part of it is competent, in regard to Mr. Shepard's authority.

Q. In the Norwich Union case was not this testified to?

"Q. Well, Mr. Rice, you say, came in January, 1892? A. Yes sir. Q. At what time did Mr. Rice retire from the business? A. January 1st, 1893. Q. Then as I understand you from your testimony, from that time on you were practically the sole owner of the insurance? A. Yes sir, until the time that Mr. Hill came on. Q. When did Mr. Shepard come into your office? A. Mr. Shepard came into our office—I guess it was in 1889. Q. That was before you were con-

nected with the business at all? A. No sir. Q. Well how soon after you became connected with the business? A. I went in in January and he came in in the fall some time. I do not remember the exact date. Q. When did Mr. Shepard leave your office? A. He left the office the 1st of October, 1893, or about that time. Q. You do not mean the first of October, 1893? A. Yes sir. Q. What were Mr. Shepard's duties? A. His duties were to keep the books, and he also acted as policy clerk and stenographer and typewriter. Q. Now previous to the time that Mr. Hill came in, subsequent to the time that Mr. Rice left, who had charge of the office when you would be out soliciting and doing outside work? A. Mr. Shepard. Q. During this time when you would be out of the office who was it that transacted business
212 with the patrons of the office that came there? A. Mr. Shepard. Q. And whatever he did at that time was just the same as you would do it if you were present? A. It depended somewhat upon circumstances. Mr. Shepard had no power to bind our company. Q. Well, he was there to answer questions for patrons who came into the office to inquire about business, was he not? A. Yes sir, he was. Q. And you held him out as a proper person to answer questions for any patron that came there? A. Yes sir. Q. And he had authority to answer questions in relation to policies that had been issued to the patrons of the office, had he not? A. Yes sir. Q. Is it not a fact that during your absence from the office Mr. Shepard was recognized as your representative, and didn't you so hold him out to the patrons of the office? A. Yes sir, in a sense I did. He acted in the same capacity that a clerk in your office would act."

Was not that testified to in the former case?

A. Yes sir.

Q. Was not this also testified:

"Q. Now who received the payment of premiums on policies when you were out of the office and gave receipts for the same? A. Mr. Shepard, our clerk and bookkeeper. Q. And any receipt that was given by Mr. Shepard for the renewal of a policy; wasn't [is] as binding and didn't you consider it so, as issued by yourself? A. Mr. Shepard would not give a receipt for the renewal of a policy; any receipt he would give in payment for a premium, or for money received would be binding. Q. If a person had a policy in your agency and it had expired and run out, and you were out of the office, and he was there, and the party would come to have the policy renewed, and the policy was made up ready for delivery, and he would receive the premium and give a receipt, would not that be just as binding upon your agency as if you were there and received the premium and gave the receipt? A. That would depend en-

tirely upon whether he knew absolutely that that policy could be renewed."

Was not that testified to?

A. I think it was.

Q. Was not this also?

213 "Q. Is it not a fact that you go to Denver quite frequently? A. For a day; something like that. Q. And be away in Denver for a day or two at a time? A. Yes sir. Q. Who represented you and had charge of the office during your absence? A. Mr. Shepard, our clerk and book-keeper."

Was not that testified to by you, and is not that a fact? Is not all this testimony that I read to you what you testified to in the former trial, a fact, and true?

A. Yes sir.

Q. Was not this also testified to?

"Q. Mr. Kirtland did you ever give notice to any of the patrons of the office that Mr. Shepard did not have any authority to issue policies or to bind the firm by any action or transaction that he was a party to, during your absence from the office? A. I do not remember [ever having] of ever giving any notice to any one that he had no authority. Q. Mr. Shepard did issue and has issued policies has he not, in your absence? A. Never signed them, no sir. Q. Hasn't he delivered them to the patrons of the office? A. Not without my knowledge; not without my instructions. Q. Has not Mr. Shepard contracted for insurance during your absence from the office? A. He may have accepted it, yes sir. It was the custom of the office that any time anybody brought in a risk and asked that it be placed, that he would accept it, but the contract could not be made without my consent. Q. Well, suppose now that a patron of the office would come in for a policy of insurance during your absence and would pay the premium? A. Yes sir. Q. Would not Mr. Shepard have had authority to give him the policy? A. No sir, not unless it was signed by me or by a member of the firm. Q. If a person came in for insurance the office didn't he have authority to make a contract for the insurance; I mean during your absence from the office? A. Mr. Shepard would have authority to accept certain risks, of course, subject to my approval as agent of the company, and issuing of
214 the policy. Q. You would recognize his actions as binding upon you, would you not? A. In ordinary business I would yes sir. Q. Now if you do not approve or recognize what he had done wouldn't you give notice to the parties with whom he had contracted or made negotiations to that effect? A. Yes sir, ordinarily. Q. In the absence of giving any notice to persons who had negotiated with Mr. Shepard would not you consider his acts as binding and would you not

ratify them, I mean if you had not given notice to the party with whom he had negotiated? *A.* If it was in direct violation of the order of the company I would not."

That was testified to by you?

A. Yes sir.

Q. And is not a fact?

A. Yes sir.

Q. Now is it not also a fact, Mr. Kirtland, that Mr. Shepard signed the firm name to letters and correspondence that was sent out?

A. He might have done so in some instances, yes sir.

Q. And didn't some of these letters that you sent to The International Trust Company, in relation to the insurance on the Mesa Hotel—were they not signed by him?

A. I cannot say positively without seeing it. Very likely they were.

Q. Was not your attention called to that in the Norwich Union case, and didn't you identify letters there that had been signed by Mr. Shepard with your name?

A. I do not remember distinctly about that but I presume there were letters that were written. He frequently signed letters that were ready to be sent out, if I did not happen to be in.

Q. Did not Mr. Shepard sign the name of Benson & Kirtland to the mortgage clause that was put in the insurance policies?

A. I think he did do it in some instances, yes sir; in many instances.

215 Q. Now I will ask you if Mr. Shepard did not sign your name to this mortgage clause in the policy in issue here, the North America policy?

A. Yes sir.

Q. That is his signature is it not?

A. Yes sir, that is his signature.

Mr. Williams: We now ask to have stri-ken out this testimony taken from the Norwich Union Record, relative to the authority of Mr. Shepard, as immaterial, incompetent and irrelevant, and upon the further ground that the question of Shepard's authority, if at all raised in this case, is with reference to a mere conversation had with Mr. Hobson on the 14th of June, when Mr. Hobson had in his possession a notice from this company of the limitations upon the agent's authority, and that constituted the authority of the agent of the company, and that in treating with Mr. Shepard in any connection that has been testified to in this case he treated with full knowledge of the limitations which the company had placed upon the authority of the agents.

The Court: Your objection is overruled, Mr. Williams. You went into this question in your direct examination as to the authority, as to his right to countersign policies, and the witness answered that he had not the right, and then you ascertained what his powers were.

To which ruling of the court the defendant duly excepted.

Q. Do you remember Mr. Gibson calling at your office on the 10th of October, 1893?

216 The Court: He has answered that question once. He says he does not remember the date.

Witness: Yes sir.

Re-direct Examination.

By S. G. Williams, Esq.

Q. Mr. Kirtland, how did it come that Mr. Shepard, you say, signed the mortgage clause in this policy?

A. Why, it was the custom of the office for the clerk in filling up these policies as a memorandum, to fill in the forms and sign them. Of course this preliminary work was all done subject to my approval and also the approval of the company.

Q. It all preceded the countersigning of the policy, did it?

A. Yes sir.

Hiram T. Lamey, a witness produced, sworn and examined on behalf of the defendant testified as follows:

Direct Examination.

By S. G. Williams, Esq.

My name is Hiram T. Lamey; age 39; residence Denver. Am manager for the British America Assurance Company, and the Western Assurance Company for seven States and Territories, Colorado, Wyoming New Mexico, Utah, Montana, Kansas and Nebraska. I have been engaged in the insurance business for fifteen years. I am familiar with the usages and customs in current underwriting throughout the territory I have named

217 I am familiar with what is known as the Standard or Union, Mortgage Clause and its use in Underwriting. Exhibit 37, to which my attention is directed, is a Standard clause. It is the New York Standard Mortgage clause. This mortgage clause is used to a very large extent among underwriters; recently to a much larger extent than formerly. By recently I mean for the last ten years—or five years.

Q. Mr. Lamey, will you look at this mortgage clause attached to policy, Exhibit 6, the policy in suit? I will ask you —

Mr. Campbell: We have no objection to their going into this matter. Let him put in all the mortgage clauses they wish, but it only encumbers the record.

Q. Will you state Mr. Lamey, in what respect the mortgage clause attached to that policy differs from the Union mortgage clause?

Mr. Campbell: We object to the witness making a comparison.

Objection sustained.

To which ruling of the Court the defendant duly excepted.

Q. I will ask you, Mr. Lamey, to look at the body of the clause attached to the policy, which is printed solid,—in brevier, they call that type, do they not? are you acquainted with that style of type?

A. It is about that size, yes sir.

Q. And state whether the provisions printed in that portion of the contract referred to are the provisions of the Standard mortgage clause?

218 Plaintiff objects for same reasons.

The Court: That is the same question that has been ruled out once. I do not care to have occasion to rule on the same question again. Please observe that I have ruled on it. It is as to making comparisons. The witness is not to make comparisons. Off r them and you may comment upon them.

Q. I will ask you, Mr. Lamey, with reference to the use of the words in the body of the mortgage clause referred to in the Union mortgage clause,—the words "mortgagee or trustee,"—for what purpose and with what intent are these two words incorporated in the mortgage clause?

Plaintiff objects. Objection sustained. To which ruling of the court the defendant duly excepted.

Mr. Williams: Now we will tender the evidence of this witness as to the use of the two words "mortgagee" and "trustee," in connection with each other, to the effect that we offer to prove by the witness that the Standard or Union mortgage clause is used by underwriters in current underwriting throughout a large territory, covering a number of States, in which a variety of forms of securities are used,—in some States, mortgages, and in others, trust deeds; that this mortgage clause is prepared with reference to use in a variety of States and circumstances. That the word "mortgagee" is used in the case of a mortgage, and "trustee" in the case of a trust

deed, according to the security which is used, and the other is either superfluous or is erased according to the circumstances and the nature of the securities. That these clauses are
219 printed by the insurance companies and distributed among their agents in the various States using these various forms of securities. I offer this testimony because to some extent the two terms "mortgagee" and "trustee" coming in juxtaposition with each other are ambiguous.

The Court: Your offer will be denied, Mr. Williams. I hardly think that in the case of a mortgage clause attached to the policy, where the words "trustee" and "mortgagee" are inserted, that the Court will say that the word "mortgagee" meant "trustee." I think the court is perhaps competent to say what the intention of the party was. I think we will take the responsibility of that.

To which ruling of the court the defendant duly excepted.

Q. I will ask you, Mr. Lamey, as to the usage in current underwriting, in case of a trust deed, and a trustee under a trust deed, as to whom the loss is made payable?

Plaintiff objected.

The Court: It is sustained upon the ground suggested a moment ago. In this case we will take this policy and endeavor to ascertain from the contract and the situation of the parties, as disclosed by the evidence, whether it is liable upon this contract. I care nothing about other contracts.

Mr. Williams: We will state the object of it. We tender the testimony of this witness to show the current practice in underwriting, with reference to trust deeds, and the
220 "Loss payable" clause, that where the loss is to be made payable for the [benefir] of the holder of the securities, the loss is made payable to the trustee; that in respect to this policy, the mortgage clause in question differs from the Union mortgage clause in current underwriting, in that it is made payable in this case direct to the Trust Company.

The Court: Yes, but you made that a part of the contract and if they had an insurable interest in the property at the time you made the contract and delivered it to the party, I expect you will be bound by the policy, no matter what the custom of the other companies may be. We will assume that your agent was sufficiently intelligent to know what he was doing at the time he signed the contract on behalf of your company, and that your company in accepting the premium ratified his acts and will have to be bound by them; so that it seems to me it narrows it down to a single question, whether

or not The International Trust Company at the time those policies were issued had an insurable interest in the policy and if so, in case of loss, you have agreed by your contract that you will pay them. It is competent for you to make that sort of a contract, I think, if you see fit to do so.

Mr. Williams: Of course, the purpose of this testimony is to enable us properly to lay before the court and invoke that rule of law or construction which is invoked so commonly and with so disastrous effect against insurance companies, that
221 the instrument which is of their making is to be construed most strongly against them, and that this instrument which is out of the way of current underwriting, and prepared by these parties, that it is to be construed most strongly against them.

The Court: They did not prepare this policy.

Mr. Williams: This mortgage clause they did.

The Court: I understand that when you sent them that mortgage contract it was your contract and not theirs. It makes no difference who furnishes the paper. Who is the one who made the contract?

Mr. Williams: That is sent by the Trust Company.

The Court: I understand that it is accepted by them. But who makes the proposition? It is offered to The International Trust Company, and when they accept it it becomes the contract of both parties.

To which ruling of the Court the defendant duly excepted.

Cross-Examination Waived.

And thereupon the plaintiff to further maintain the issues on its behalf, gave in rebuttal as follows:

Frank B. Gibson, a witness recalled on behalf of the plaintiff, testified as follows:

Direct Examination

By A. C. Campbell, Esq.

I was cashier and assistant secretary of the International Trust Company from July, 1893, until October, 1893. I
222 had no knowledge or intimation of the transfer of the Mesa Hotel property from John R. Gordon to the Mesa HotelCompany until after the fire.

Henry W. Hobson, a witness recalled on behalf of the plaintiff, testified as follows;

Direct Examination

By A. C. Campbell, Esq.

Q. Mr. Hobson I believe you stated that you were the vice-president of the International Trust Company during the year 1893.

A. Yes sir.

Q. What knowledge, if any, did you have as to the transfer of the Mesa Hotel property at Pueblo, Colorado, from John R. Gordon to the Mesa Hotel Company, until after the fire?

A. The first I ever heard of the transfer was a telegram that I received on the morning of the 10th of October, 1893, in Chicago; and so far from having any knowledge of it, the transfer was made in the face of a direct prohibition by me against having any transfer.

Q. If any officer of the Trust Company had any knowledge of the transfer prior to the fire, state whether or not you would have known it?

A. I certainly would. I was practically the principal executive officer of the Company at that time. Mr. Moffat was nominally president of the Company, but took no part in the management of the business. Reports were made to me every day concerning the business of the Company and I kept up very closely to it at that time. There never was any knowledge on the part of our Company that any transfer was made, until after the fire.

Q. There has been testimony introduced here on the part of the defendants in each case, what they term additional
223 proofs or amended proofs of loss. I believe they were furnished by you on the 16th day of January in each case. Just state how you came to make those additional proofs?

[—] I did it entirely voluntarily. Mr. Piper and other agents of the insurance companies knew at the time that the Alliance paid up their policy. We made a compromise, on which they paid us in full on one policy, and the second policy I abandoned because I thought that we had no legal claim against them; and Mr. Piper, I talked with him, as he says, and I had the papers on my desk some two weeks before we got the money, and I spoke of it. The papers which were sent on the 16th of January were purely voluntary, and I suppose I did it out of my desire not to have a sworn statement standing out, sworn to by Mr. Gibson, the assistant secretary of the Company, uncorrected; and it was not intended in any sense except for that purpose. That is, we did not want it to appear of record that we had a statement outstanding that was not correct.

Q. When this premium was paid by The International Trust Company to Benson & Kirtland, on the North America policy

in controversy, state what arrangements, if any, you had with Mr. Gordon as to paying that premium?

A. None in the world.

Objected to.

Q. There has been introduced in evidence a letter that was shown to Mr. Benson. I will hand you Exhibit 36, the letter of January 20th, 1894, addressed to John R. Gordon, and signed M. V. B. Benson, and will ask you if you ever saw that
224 letter before?

A. Yes sir.

Q. How soon after the date did you receive it?

A. I cannot remember the date when it was received and turned over to me. It was turned over to me by Mr. Gordon shortly after it was written. He brought it to me immediately and handed it to me, and I have had it in my possession, or in the possession of the Trust Company, ever since.

Q. State whether or not you, had received that letter and knew of its contents before the institution of the suit?

A. Oh, I think several weeks. Yes sir, and a letter I got from Mr. Benson, which was introduced in evidence this morning, tendering us back our premium, convinced me that they were trifling and fighting for time and were not going to pay, and I brought suit after that.

Q. Mr. Hobson, did either of these insurance companies, the defendants in these actions, ever make any demand for appraisal of the property?

A. Not one, no sir. Nobody ever made any demand for an appraisement.

Said letter is received in evidence as Exhibit 33.

Cross Examination.

By S. G. Williams, Esq.

Q. Mr. Hobson, did the International Trust Company ever make any demand for an arbitration?

A. It did not, sir. It was not our business.

Motion to strike out.

225 The Court: Let the answer stand.

Q. Mr. Hobson, you say that you had no arrangement whatever with Mr. Gordon in regard to paying the premiums, on these policies?

A. Yes sir. I do not say that we never had any conversation with Mr. Gordon about it.

Q. I will ask you whether on September 13th Mr. Gordon did not write you giving a statement in regard to these premiums,

from both Morris, and Benson & Kirtland, asking you to pay for them, in which he says:

"I dislike to ask you to advance this amount but I do not see any other way at present. If you will send the amount to Mr. Beaumont to settle with the parties, it will be a great favor and I will not incur any more obligations without consultation with you beforehand."

Did you receive that letter from Mr. Gordon?

A. Yes sir.

Q. And that was before you paid the premium?

A. Yes sir, and we had received a demand before from the companies, the agents, that we should pay it too.

Q. Where is that demand?

A. The Insurance Company of North America's was a verbal demand, either delivered to us by Mr. Gordon or some one else. We were notified positively, Mr. Williams, that unless the premiums were paid the policies would be cancelled, and in accordance with that we wrote the letter of September 16th to Benson & Kirtland asking them to let the insurance stand until—

Q. That was after you received this letter from Mr. Gordon? His letter is dated the 13th.

A. It may have been. Yes, it was after that. Let
226 me read the letter, please. Mr. Gordon in this letter says as follows: "I just received a note from Mr. Morris stating that unless paid this week he would have to cancel. Mr. Kirtland had told me about the same thing." He then asked me to pay, and in pursuance of that notice I wrote this letter to Benson & Kirtland.

Q. Then that notice from Mr. Gordon with a request to pay the premium, was the first request you had from Mr. Kirtland?

A. I think so. It was not a demand. I knew for some time that the premiums were unpaid.

John F. Bell, a witness produced, sworn, and examined on behalf of the plaintiff, in rebuttal testified as follows:

Direct Examination.

By A. C. Campbell, Esq.

Q. Mr. Bell, I believe you are the secretary of The International Trust Company, the plaintiff in these two actions?

A. Yes sir.

Q. How long have you held that position?

A. Ever since the company was formed.

Q. And when was that?

A. January, 1892.

Q. When did you receive knowledge that John R. Gordon had transferred the hotel property in Pueblo, Colorado, known as the Mesa Hotel, to the Mesa Hotel Company?

A. I think about a week after the fire; the first time that Gordon was in town.

Mr. Campbell: Now we have a stipulation here that we may read part of the testimony in the Norwich Union case, as to the knowledge of Mr. Thatcher.

227 Mr. Williams: There is no use reading that. Mr. Thatcher will testify that he knew nothing about it. We will admit that in regard to Mr. Thatcher.

The above and foregoing is all of the evidence given or offered by either plaintiff or defendant. And thereupon plaintiff rested, and defendant thereupon, and at the conclusion of the testimony moved for a judgment for defendant, upon the ground that the evidence does not show facts sufficient to constitute a cause of action.

Which motion the Court overruled. And to the overruling of said motion defendant then and there duly excepted.

And thereupon the defendant requested the Court to rule as a matter of law upon the evidence, that from the correspondence between The International Trust Company and The Investors Mortgage Security Company, Limited, relative to the repurchase of the Gordon note by The International Trust Company, and upon all of the testimony relative thereto, that the ownership and title to the said Gordon note did not vest in The International Trust Company until after the issuing of defendant's policy.

Which request was by the Court refused.

And to the refusal of the Court to make said ruling, and to the ruling of the Court that the ownership and title did vest in The International Trust Company prior to the issuing
228 of defendant's policy, defendant then and there duly excepted.

And defendant further requested the Court to rule as a matter of law from the evidence that The International Trust Company did not have an insurable interest in the property or in the indebtedness at the time of the issuing of defendant's policy.

Which request was refused by the Court.

And to the refusal of the Court to make the ruling requested, and to the ruling of the Court that The International Trust Company did have an insurable interest at the time said policy was issued, defendant by counsel then and there duly excepted.

And defendant then and there requested the Court to rule as a matter of law that The International Trust Company, as shown by the evidence, did not have such insurable interest either in the property or the indebtedness as was sufficient in law to sustain the policy and did not have the insurable interest required by the terms of the policy and mortgage clause.

Which request was by the Court refused, and to which action of the Court the defendant duly excepted at the time.

And the Court then made the following special findings of fact:

The above cause having come on for trial before the Court, without a jury, upon an express stipulation of the parties, in writing filed herein, waiving a jury and agreeing to submit the matters of law and fact to the Court for its decision; and
229 the Court having fully heard the evidence of plaintiff and defendant and the argument of counsel for both parties, and having duly considered the same, doth, upon the evidence submitted to it, adjudge and find from such evidence the following facts.

I.

That on the 12th day of December, 1892, one, John R. Gordon, was the owner of certain property in the City of Pueblo, State of Colorado, being lots 11, 12, 13, 14, 15 and 16, block 126, formerly South Pueblo, now part of the City of Pueblo, together with the hotel building thereon in process ef construction.

II.

That on the 12th day of December, 1892, the plaintiff, The International Trust Company, loaned to the said John R. Gordon the sum of $50,000, and in evidence of the same, received from the said John R. Gordon his note payable June 12, 1893, with interest at the rate of 7 per cent per annum, and to secure said note the said John R. Gordon did execute to one Mahlon D. Thatcher, as trustee, a deed of trust upon all and entire the property aforesaid.

III.

That at the time said loan was made the said John R. Gordon was carrying insurance in the form and shape of builder's risks upon said hotel building, in process of construction, to a large amount, of which said insurance $10,000 was being carried by the defendant company upon a policy which expired on
230 the 6th day of January, 1893.

IV.

That on or about the 14th day of December, 1892, the loss, if any, under the said policy of insurance, issued by defendant, company, as aforesaid, was made payable to The International Trust Company and its assigns, by attaching to said policy a mortgagee clause in the form and to the effect hereinafter set out.

V.

That on or about the 29th day of December, 1892, The International Trust Company sold and transferred to The Investors Mortgage Security Company (Limited) of Scotland, said note of John R. Gordon; and of the sale and transfer of said note no notice was ever given to defendant company.

VI.

That upon the expiration of the policy of defendant company, on or about January 6th, 1893, a renewal policy of insurance was issued by defendant company, in the name of John R. Gordon, upon the hotel building in process of construction, to the amount of $10,000, with loss, if any, payable to The International Trust Company and its assigns, by virtue of a mortgage clause attached to said policy in the form and substance as hereinafter set out, which said policy of insurance expired on the 6th day of July, 1893.

VII.

That prior to the 12th day of June, 1893, the said Investors Mortgage Security Company (Limited) had notified The International Trust Company, which acted at its agent that
231 it desired the Gordon loan to be paid at maturity, and the Trust Company thereupon and on the 12th day of June so notified the said John R. Gordon.

To which finding of the Court the defendant then and there duly excepted, because the same is immaterial.

VIII.

That on the 12th day of June, 1893, when the loan of the said John R. Gordon became due and payable, he being unable to pay the same and the holder of his said note demanding payment, The International Trust Company, by its executive committee, determined to repurchase said loan and authorized the officers of said company to so re-purchase it.

To which finding by the Court the defendant then and there duly excepted, because immaterial and not sustained by the evidence.

IX.

That in pursuance of such authority, The International Trust Company, did, on the 12th day of June, 1893, re-acquire title to the note of said John R. Gordon by re-purchase, and did re-acquire an insurable interest in and to the property covered by the policy of insurance issued by defendant company; and the said Trust Company did, on the 12th day of June, 1893, actually pay to the said Investors Mortgage Security Company the sum of $1,750, being part of the amount due upon repurchase, and did assume the payment of the balance of the purchase price, viz. $50,000, and did from that time on treat and dispose of said note as its own property. That although said note has never been foreclosed, no definite extension of
232 the same has ever been given and the same has remained in default ever since the 12th day of June, 1893.

To which finding by the Court the defendant then and there duly excepted, for that said finding is not supported by the evidence, and more fully as set out in the special exception below set out.

X.

That by agreement between the International Trust Company and the said Investors Mortgage Security Company, The International Trust Company was given time wherein to make the payment of the balance of $50,000 upon the re-purchase price, as aforesaid, and it did thereafter pay said amount in full to The Investors Mortgage Security Company, with interest thereon at 7 per cent from the 12th of June, 1893, to September 12th, 1893; and at the rate of 9 per cent from September 12th to date of payment.

To which finding by the Court the defendant then and there duly excepted, because not sustained by the evidence.

XI.

That on the 14th day of June, 1893, the vice-president of The International Trust Company personally visited the offices of John H. Kirtland, doing business under the firm name of Benson & Kirtland, agent of the defendant company in Pueblo, Colorado, whilst the said Kirtland was absent and did then and there inform one William B. Shepard, a clerk and employe of the said John H. Kirtland, who informed said Trust Company officer that he had authority to represent said Kirtland
233 and to speak for him in reference to the insurance on the Mesa Hotel, that The International Trust Company was considering whether it would foreclose the loan of said John R. Gordon or not; that the question of insurance was an important element in determining that matter; that The Inter-

national Trust Company desired to know whether the defendant company would continue its insurance upon said hotel property, and had made arrangements for other insurance in case defendant company should decline so to do. Said officer of The International Trust Company also fully informed the said Shepard of the condition of said building; that thereupon said Shepard assured said officer of The International Trust Company that the defendant company would continue to carry such insurance as long as the premiums were paid.

To which finding by the Court the defendant then and there duly excepted.

XII.

That the said John H. Kirtland, doing business as Benson & Kirtland, as agent of defendant company, was furnished with policies signed in blank, ready for delivery upon being filled out and countersigned by him as agent at Pueblo, on June 14th, 1893, and had full power and authority to accept risks and issue policies of insurance according to his discretion within the city of Pueblo, in accordance with the general rules and regulations of said defendant company, which said authority continued up to the 9th day of October, 1893; that the
234 said William B. Shepard, on the 14th day of June, 1893, had been for a long time the confidential clerk and office man of the said firm of Benson & Kirtland, attended to most of the inside work of said office, had power and authority to perform and transact most of the business of said office, except the actual countersigning of policies, had authority to represent said Kirtland with patrons of the office and parties seeking insurance, to accept risks according to the general rules of the office, receipt for premiums, and generally do and perform the insurance business of the office with the exception of countersigning policies; that the patrons of the office had been accustomed to deal with the said Shepard in regard to insurance issued therefrom, and had no notice or knowledge of any limitation upon his authority in regard to such business.

To which finding by the Court the defendant then and there duly excepted, because immaterial and not sustained by the evidence.

XIII.

That on or about the 6th day of July, 1893, the policy issued on the 6th day of January, 1893, as above set out, having expired, the defendant company, by and through its agent, aforesaid, did issue a renewal policy of insurance to John R. Gordon, upon the Mesa Hotel property aforesaid, for the sum of $10,000, expiring January 6th, 1894, with loss under said policy payable to The International Trust Company and its assigns

by a special mortgagee clause attached to said policy, in words and figures following, to-wit:

Whereas, The property described in this Policy has
235 been conveyed to Mahlon D. Thatcher in trust, to secure the payment of a certain indebtedness to the International Trust Company, Denver, Colorado:

And Whereas, the owner of the Policy has requested that the loss, if any, be made payable to the said Company; Therefore, the loss, if any, is made payable to the International Trust Company, Denver, Colorado, and its assigns.

It Being Hereby Understood and Agreed, That this insurance, as to the interest of the Mortgagee or Trustee only therein, shall not be invalidated by any act or neglect of the Mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy. Provided, that in case the Mortgagor or owner neglects or refuses to pay any premium due under this Policy, then on demand, the Mortgagee or Trustee shall pay the same. Provided, also, that the Mortgagee or Trustee shall notify this Company of any change of ownership or increase of hazard which shall come to his, or their knowledge, and shall have permission for such change of ownership or increase of hazard duly endorsed on this Policy. And Provided Further, that every increase of hazard not permitted by the Policy to the Mortgagor or owner, shall be paid for by the Mortgagee or Trustee on reasonable demand, and after demand made by this Company upon, and refusal by the Mortgagor or owner to pay, according to the established schedule of rates. It is, however, understood that this Company reserves the right to cancel this Policy, as stipulated in the printed conditions of said Policy; and, also, to cancel this agreement on giving ten days' notice of its intention to the Trustee or Mortgagee named therein, and from and after the expiration of the said ten days this agreement shall be null and void. It is Further Agreed that in case of any other insurance upon the property hereby insured, then this Company shall not be liable, under this Policy, for a greater portion of any loss sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein. It is also Agreed that whenever this company shall pay the Mortgagee or Trustee any sum for loss under this Policy, and shall claim that as to the Mortgagor or owner no liability therefor exists, it shall at once and to the extent of such payment be legally subrogated to all the rights of the party to whom such payment shall be made, under any and all securities held by such party for the payment of said debt. But such

subrogation shall be in subordination to the claim of said party for the balance of the debt so secured. Or said Company may, at its option, pay the said Mortgagee or Trustee the whole debt so secured, with all the interest which may have accrued thereon to the date of such payment, and shall thereupon receive from the party to whom such payment shall be made an assignment and transfer of said debt, with all securities held by said parties for the payment thereof.

In testimony that the foregoing provisions are made a part of Policy No. 2085, of Insurance Company of North America to which they are attached, witness my hand at Pueblo, Colorado, this sixth day of July, A. D. 1893.

BENSON & KIRTLAND, Agents.

Accepted and agreed to by

THE INTERNATIONAL TRUST COMPANY.

By Henry H. Hobson, Vice Pres.

And said policy with mortgagee clause attached was thereupon transmitted to The International Trust Company and had been in its possession ever since its receipt.

To which finding by the Court the defendant then and there duly excepted.

XIV.

That on the 14th day of June, 1893, and on the 6th day of July, 1893, the defendant company, by and through its agent as aforesaid, had notice that the loan of the said John R. Gordon was in default and unpaid; that the ownership of the same was claimed by The International Trust Company; that furthermore the
236 agent of defendant company in issuing such renewal dealt directly with The International Trust Company and with the understanding and knowledge that such policy of insurance with mortgagee clause attached was issued for the benefit and protection of said Trust Company; and furthermore after the 6th day of July, 1893, and prior to the time when the property insured was destroyed by fire, the agent of defendant company dealt directly with The International Trust Company, and it was understood that said policy of insurance was in existence and was being carried for the benefit and protection of The International Trust Company as owner of the note of John R. Gordon aforesaid.

To which finding by the Court the defendant then and there duly excepted, because not sustained by the evidence.

XV.

That prior to the 6th day of July, 1893, and on or about the 3rd day of July, 1893, the said John R. Gordon transferred and

conveyed the title of the real estate and Mesa Hotel property aforesaid to a corporation known as The Mesa Hotel & Improvement Company, the deed of conveyance being recorded on the 3rd day of July, 1893.

XVI.

That neither the International Trust Company, nor any officer thereof, nor the said M. D. Thatcher, trustee, had any notice or knowledge of such conveyance whatsoever, until subsequent to the destruction of the said hotel building by fire on the 9th day of October, 1893, as hereinafter set out; nor did the de-
237 fendant company or its agent have any such notice or knowledge of the conveyance aforesaid.

XVII.

That on or about the 5th day of August, 1893, and again in the month of September, 1893, the defendant company by and through its agent, did agree with The International Trust Company to keep said Trust Company insured under the policy issued as aforesaid until such Trust Company was notified to the contrary.

To which finding by the Court the defendant then and there duly excepted, because, the same is not sustained by the evidence.

XVIII.

That on the 26th day of September, 1893, the said John R. Gordon not having paid the premiums on the policy issued by the defendant company on July 6th, 1893, as aforesaid, and demand having been made upon The International Trust Company by the agent of defendant company for the payment of said premium, the said Trust Company did, in pursuance of the provisions of the mortgagee clause attached to the policy aforesaid, pay to the agents of the defendant company the premium upon said policy in full, and the money so paid as premium has been ever since said date in the possession of the agent of defendant Company or of the defendant Company itself.

To which finding by the Court the defendant then and there duly excepted.

XIX.

That on the 9th day of October, 1893, the hotel building cov-
ered by the policy of insurance aforesaid was, without
238 any fault on the part of the International Trust Company or of the said John R. Gordon destroyed by fire, and the loss for all practical purposes was total; that the value of said hotel building at the date of the fire was $130,000 and

the loss occasioned by said fire was $130,000; that the amount of insurance upon said hotel building at the time of said fire did not exceed in any event $40,000, even if it reached such amount.

That at the time of said fire The International Trust Company was still the owner of the note of John R. Gordon aforesaid and had an insurable interest in and to the hotel property aforesaid; that the note of the said John R. Gordon is still due and unpaid.

To which finding by the Court the defendant then and there duly excepted.

XX.

That on the 12th day of October, 1893, notice in writing of such fire was given to the defendant company by The International Trust Company, in accordance with the terms of the policy of insurance aforesaid.

XXI.

That on the second day of November, 1893, proofs of loss were furnished to defendant company by The International Trust Company, which said proofs of loss were in accordance and complied with the requirements of the provisions of the policies of insurance aforesaid.

239 To which finding by the Court the defendant then and there duly excepted.

XXII.

That on or about the 16th day of January, 1893, The International Trust Company did voluntarily and without any demand on the part of the defendant company, serve upon the defendant company a notice to the effect that by mistake it had included in the proofs of loss aforesaid, a policy of insurance alleged to have been issued by the Alliance Assurance Company of London for $10,000, under which The International Trust Company had no legal claim, and having discovered such mistake, desired to correct the same.

XXIII.

That the facts with regard to the policy of the Alliance Company, concerning which the mistake was made, were fully known to the State Agent of the defendant company as well as to the agents at Pueblo soon after the destruction of said hotel by fire, and no objection was ever at any time made by defendant company on account of the mention of said Alliance policy in the proofs of loss, and no point was ever made concerning

the mistake aforesaid until after suit was brought against defendant company. Furthermore, that the mistake aforesaid was made in good faith and inadvertently and was immaterial, and did not in any wise effect the validity of the original proofs as filed and did not in any wise prejudice defendant company in its determination as to the payment or refusal of payment of said policy.

240 To which finding by the Court the defendant then and there duly excepted, because not sustained by the evidence.

XXIV.

That defendant company, by all of its actions and conduct from the time of said fire and shortly after, denied its liability under said policy upon grounds foreign to the matter of proofs of loss, and arising out of transactions occurring before the fire. And the defendant company did, by and through its agents, prior to the bringing of suit in this action, deny its liability under said policy upon grounds and matters arising prior to the destruction of said hotel property; that the defense of defendant company in this suit, as shown by the evidence, principally rests upon grounds entirely foreign to the proofs of loss, and going to the question of its liability under said policy at the time of said fire. And furthermore, that defendant company did make a tender of the premium paid by The International Trust Company, as hereinbefore set out, and claimed the right to cancel said policy.

To which finding by the Court, except as to that part finding that the defendant made tender of the premium, the defendant then and there duly excepted, as not supported by the evidence.

XXV.

That there was never any arbitration concerning the amount of loss, under the provisions of the policy of insurance aforesaid nor was there ever, so far as the evidence shows, any difference between the International Trust Company and
241 defendant company concerning the amount of loss; nor was an arbitration ever demanded by either party.

To which finding by the Court, that there never was any difference between the plaintiff and defendant as to the amount of loss, the defendant then and there duly excepted.

XXVI.

That suit was begun by The International Trust Company on the 16th day of February, 1894, more than sixty days after the proofs of loss had been furnished by The International Trust Company to defendant company.

To which finding by the Court the defendant then and there duly excepted, because not sustained by the evidence.

XXVII.

Upon the foregoing facts the Court finds as a matter of law that the plaintiff company is entitled to a judgment against defendant company under said policy for the sum of ten thousand dollars ($10,000) with interest at eight per cent per annum from the 3rd day of January, 1894.

To which finding by the Court the defendant then and there duly excepted.

And to the special findings of fact made by the Court and to each of said special findings, defendant then and there excepted on the ground that said findings and neither of them are supported by the evidence.

242 Defendant further specifically excepts to the ninth special finding of fact made by the Court, on the ground that said special finding as to the ownership of the Gordon note is a conclusion of law from the evidence and not a finding of fact; and because the finding that The International Trust Company had an insurable interest at the time of the issuing of the policy is a conclusion of law and not a finding of fact; and because it is shown by the evidence that the entire negotiation relative to the re-purchase of the Gordon note by The International Trust Company was conducted by correspondence which is in evidence and fully set forth in the record and that said correspondence and all of the evidence relating thereto show as a matter of law that the ownership and title to said note was not acquired by nor vested in The International Trust Company at the time the policy of defendant was issued. And because said correspondence and all the evidence relating thereto show as a matter of law that The International Trust Company did not have at the time said policy was issued a valid, legal or sufficient insurable interest in the property or in the indebtedness to support the policy and mortgage clause, and did not have the insurable interest required and called for by the policy and mortgage clause. And to the making of said special finding over the objection of the defendant, defendant then and there duly excepted.

243 Defendant as a substitute for and in lieu of the fifth special finding requested the Court to find as follows:

"That on or about the 29th day of December, 1892, The International Trust Company sold and transferred, and endorsed without recourse, to The Investors Mortgage Security Company,

Limited, of Scotland, said note of John R. Gordon; and of the sale and transfer of said note, no notice was ever given to defendant company."

Which request and finding the Court refused to make, and to the refusal of the Court the defendant by counsel then and there excepted.

Defendant as a substitute for and in lieu of the seventh special finding requested the Court to find as follows:

"That prior to the 12th day of June, 1893, the said Investors Mortgage Security Company, Limited, of Scotland, had transmitted the Gordon note to The International Trust Company for collection the same being received for collection on June 7th, 1893, and said Investors Company had informed The International Trust Company that on the re-payment of the Gordon loan, on the 12th of June, they should require the money at their bankers in New York; and the Trust Company thereupon, and on the 12th day of June, so notified the said John R. Gordon."

Which request and finding the Court refused to make, and to the refusal of the Court the defendant by counsel then and there excepted.

Defendant as a substitute for and in lieu of the tenth special finding requested the Court to find as follows:

"That by agreement between the International Trust Company and the said Investors Mortgage Security Company, which agreement was made by correspondence, being by a proposition from The Investors' Company by letter of August 21st,
244 1893, and acceptance of said proposal by The International Trust Company September the 5th, 1893, The International Trust Company was paid $10,000 on September 12th, 1893, as a part payment in re-purchase of the Gordon note, together with the interest on said note at the rate of 7 per cent from June 12th, 1893, to September 12th, 1893; and was given time wherein to make a payment of the balance of $40,000 upon said note with interest at the rate of 9 per cent. from September 12th to date of payment."

Which request and finding the Court refused to grant and to the refusal of the Court the defendant by counsel then and there excepted.

Defendant as a substitute for an– in lieu of the twelfth special finding, requested the Court to find as follows:

"That the said John H. Kirtland, doing business as Benson & Kirtland, as agent of the defendant company was furnished

with policies signed in blank, ready for delivery upon being properly filled up and countersigned by the said Kirtland, as agent at Pueblo. Kirtland had full power and authority to accept risks and issue policies of insurance within the city of Pueblo in accordance with the general rules and regulations of said defendant company, and in accordance with the authority set out in the policies of defendant company, which said authority continued up to the 9th of October, 1893. That the said William B. Shepard on the 14th day of June, 1893, had been for some time past policy clerk and bookkeeper in the office of Benson & Kirtland, with such power and authority as attached to that position; but without any authority to make contracts of insurance or to countersign policies or to deliver policies without the authority of Kirtland, or to accept risks except upon the approval of said Kirtland; to receipt for premiums, and generally to do and perform such duties as are incident to the capacity of policy clerk and bookkeeper in which capacity he was employed."

245 Which request and finding the Court refused to make, and to the refusal of the Court the defendant by counsel then and there excepted.

Defendant as a substitute for and in lieu of the fourteenth special finding, requested the Court to find as follows:

"On the 14th of June the vice president of the International Trust Company, informed the clerk Shepard, that the loan of the said John R. Gordon was in default and unpaid; and that The International Trust Company owned the note. There is no evidence as to whether upon issuing the policy in suit said policy was sent directly to The International Trust Company, or whether it was sent by Gordon. But all dealings so far as J. H. Kirtland, the agent of the company was concerned, with respect to the policy in suit were had with John R. Gordon. The agent of the company, J. H. Kirtland, declined repeatedly to correspond with or deal with The International Trust Company directly with reference to this insurance, but insisted at all times in dealing with John R. Gordon."

Which request and finding the Court refused to make, and to the refusal of the Court the defendant by counsel then and there excepted.

Defendant as a substitute for and in lieu of the eighteenth special finding, requested the Court to find as follows:

"That on the 26th day of September, 1893, the said John R. Gordon not having paid the premium on the policy issued by defendant company on July 6th, 1893, as aforesaid, and Gordon having solicited and requested The International Trust

Company to pay the premium, the said Trust Company did in pursuance of said request pay to the agent of defendant company the premium upon said policy in full, and the
246 moneys so paid as premium has ever since said date been in the possession of the agent of defendant company: but at the time of payment of the premium neither the defendant nor its agent had any knowledge of the sale of the Gordon note to The Investor's Company, nor of any sale of the property by Gordon, but believed at all times until after the fire that The International Trust Company was at all times the sole and unconditional owner of the Gordon indebtedness and note, and that Gordon was at all times the sole and unconditional owner of the building. That, after the fire, but before the bringing of this suit, and when the defendant had been informed of the sale and transfer of the property, and of the note, the defendant duly tendered back to The International Trust Company all of the premiums with interest from date of payment; which the plaintiff refused to accept."

Which request and finding the Court refused to make, and to the refusal of the Court the defendant by counsel then and there excepted.

Defendant as a substitute for and in lieu of the twenty-first special finding, requested the Court to find as follows:

"That on the 2nd day of November, 1893, proofs of loss were furnished to the defendant company by The International Trust Company, which proofs of loss were in substantial conformity to the requirements of the policy, but in said proofs of loss the plaintiff stated that it held at the time of the fire a total insurance of $50,000, and that among other policies comprising the $50,000 insurance were two policies of $10,000 each, in the Alliance Assurance Company."

Which request and finding the Court refused to make, and to the refusal of the Court the defendant by counsel then and there excepted.

Defendant as a substitute for and in lieu of the
247 twenty-second special finding, requested the Court to find as follows:

"That on or about the 16th day of January, 1894, the International Trust Company, the plaintiff, did voluntarily and without any demand on the part of the defendant company, serve upon the defendant company a notice and sworn statement, as an amendment to its original proof of loss, amending the original statement, made with respect to the amount of insurance, to the effect that the plaintiff in fact held but one policy for $10,000 in the Alliance Assurance Company

instead of two policies in that company, for a total amount of $20,000; and that the entire amount of insurance held by the plaintiff at the time of the fire was $40,000 instead of $50,000. This amended statement was delivered to the defendant within thirty days immediately preceding the date at which this suit was entered."

Which request and finding the Court refused to make, and to the refusal of the Court the defendant by counsel then and there excepted.

Defendant as a substitute for and in lieu of the twenty-third special finding, requested the Court to find as follows:

"That the facts regarding the policy of the Alliance Company were fully known to the State agent of the defendant company, as well as to the local agents at Pueblo, at the time said policy was issued. That the said Alliance policy was a few days previous to the fire delivered by the agents of that company, to the State Agent of the defendant company, for the purpose of taking up the policy of defendant then in the hands of the International Trust Company. That said State Agent had presented at plaintiff's office in Denver the Alliance policy for substitution for defendant's policy, at the hour the property was burning, and plaintiff had refused to accept or substitute it; but plaintiff nevertheless subsequently made claim against the Alliance Assurance Company under that policy
248 and had informed the defendant by its original proof of loss that it claimed to be insured under the said Alliance policy. That up to the 16th of January the plaintiff had not informed the defendant that its claim against the Alliance Company had been compromised or abandoned. The defendant company had at no time objected to the mention of said Alliance policy in the original proofs of loss."

Which request and finding the Court refused to make, and to the refusal of the Court the defendant by counsel then and there excepted.

Defendant as a substitute for and in lieu of the twenty-fourth special finding, requested the Court to find as follows:

"The only communication produced in evidence as made by defendant company to the plaintiff, relative to its liability, was the letter of January 20th, 1894, in which defendant said;

'Upon information, we have been led to believe that facts involved in this case are at material variance with statements made in the claim for loss presented by you; both in respect

to the value of the property destroyed and as to a number of matters which go to affect the question of our liability. We are also led to believe upon recent advices that our policy has never been a subsisting contract in favor either of your company or of Mr. Gordon. Having sought to secure the information and advice necessary to determine the questions which have thus been presented to our consideration, we shall endeavor to reach a conclusion without subjecting you to any trouble or expense. As it may require some time yet for the purpose of our inquiries, we beg to say that it is not our intention or desire to retain the premiums or considerations paid by you or Mr. Gordon for this policy, unless it should be determined that the policy is clearly a valid contract. We are prepared therefore, pending further investigation, and at any time to refund the full premium paid upon this policy, with interest thereon from date of payment. The company will honor your demand therefor at any time through the undersigned, or at either its Denver or Pueblo local agency.'

The defendant did in a letter of same date to John R. Gordon state:

'It does not appear to the satisfaction of the company that any liability exists in your favor under said policy. We must decline therefore to recognize your claim.'"

Which request and finding the Court refused to make, and to the refusal of the Court the defendant by counsel then and there excepted.

249 Defendant as a substitute for and in lieu of the twenty-fifth special finding requested the Court to find as follows:

"That there was never any arbitration concerning the amount of loss under the provisions of the policy of insurance aforesaid, nor was there ever any ascertainment or estimate or agreement by the defendant and the plaintiff or by the defendant and Gordon as to the amount of loss; nor was there an arbitration ever demanded by either party."

Which request and finding the Court refused to make, and to the refusal of the court the defendant by counsel then and there excepted.

Defendant as a substitute for and in lieu of the twenty-sixth special finding requested the Court to find as follows:

"That suit was begun by The International Trust Company on the 17th day of February, 1894, more than sixty days after the original proofs of loss had been furnished by The International Trust Company to defendant company, but within less than thirty days after the amendment to the proofs of loss furnished on January 16th, 1894."

And in lieu of and as a substitute for the twenty-seventh special finding, being the finding of law that the plaintiff is entitled to judgment, the defendant requested that judgment be entered for defendant. Which request the Court refused, and to the refusal of the Court to enter judgment for defendant, the defendant by counsel duly excepted.

Whereupon the Court ordered that judgment be entered herein in favor of the plaintiff and against the defendant for said sum of $10,968.88 damages, and the said plaintiff's costs to be taxed.

250 And to the giving and entering of judgment for the plaintiff and against the defendant, as aforesaid, the defendant then and there by counsel duly excepted.

MEMORANDUM.

The Exhibits hereto attached are not identified by consecutive numbers, for the reason that the testimony of the plaintiff Company against The Sun Insurance Office was taken together with the case of the plaintiff Company against The Ins. Co. of North America, and the intervening numbers omitted from this bill of exceptions are Exhibits of the case of The Sun Insurance Office only.

EXHIBIT 1.

Exhibit 1 is an application by John R. Gordon for a loan of $50,000, upon the Mesa Hotel property; the original Exhibit introduced in evidence being omitted by consent of the parties.

EXHIBIT 2.

Exhibit 2 is the deed of trust from John R. Gordon to Mahlon D. Thatcher, Trustee, given to secure the loan from The International Trust Company to John R. Gordon; the original Exhibit as filed in Court being omitted herefrom by consent of the parties.

251 EXHIBIT 3.

The International Trust Company.

$50.000 Denver, Colorado, December 12th, 1892.

On the Twelfth day of June, A. D. 1893 for value received I promise to pay to the order of The International Trust Company the principal sum of Fifty Thousand Dollars in gold coin with interest thereon, at the rate of seven (7) per cent per annum from date until maturity, payable semi-annually according to the tenor of one (1) interest notes hereto attached bearing even date herewith, both principal and interest payable at the office of The International Trust Company, Denver, Colo.

This note bears interest from maturity until paid at the rate of ten (10) per cent. per annum. On failure to pay any installment of interest when due the holder may collect the principal and interest at once.

No. 1026. JOHN R. GORDON.

This note is secured by Trust Deed on Lots No. 11 to 16 inclusive Block 126 in South Pueblo.

$1750. Denver, Colo., Dec. 12th, 1892.

On the 12th day of June 1893 for value received I promise to pay to the order of the International Trust Company Seventeen Hundred Fifty Dollars at the office of The International Trust Company, Denver, Colo. being the interest due on a principal note No. 1026 for $50,000 of even date herewith. This note bears interest from maturity until paid at the rate of ten per cent per annum.

The International Trust Company, Denver, Colo.

No. 1 JOHN R. GORDON.

Gordon No. 541. $50,000

COUPON TRUST DEED NOTE.

Interest and Principal payable at the office of The International Trust Company, Denver, Colo.

For value received, we hereby transfer and assign the within Note, together, with all interest in and rights under the Trust Deed securing the same, to The Investor's Mortgage Security Co. Ld. without recourse.

THE INTERNATIONAL TRUST COMPANY.

By John F. Bell, Sec'y.

Pay John F. Bell Trustee for Investors Mortgage Security Company.

GUILD & SHEPHERD, Secretaries.

Pay The International Trust Company or Order without recourse.

JOHN F. BELL, Trustee.

By Colorado Laws the property securing the note is conveyed to a trustee who holds it in trust for the note holder until the note is paid; if the interest or the principal is not paid the property may be sold, four weeks newspaper notice being required.

The transfer of the note carries the trust deed with it, on other transfer being necessary.

252 Exhibit 4 is the policy of insurance of the defendant company, issued January 6, 1893, and expiring July 6, 1893, to John R. Gordon, for $10,000, with The International Trust Company's mortgage clause attached. This policy is identical in form with the policy No. 1805, Exhibit 5, and a copy of said policy is attached as Exhibits A and B to and made a part of plaintiff's complaint, to which reference is hereby made. The original of this Exhibit No. 5 filed in Court is omitted herefrom by consent of the parties.

EXHIBIT 5.

Exhibit 5 is the policy of insurance No. 1934 [1805] of Insurance Company of North America, the defendant, issued July 6, 1892, and expired January 6, 1893, being for $10,000, to John R. Gordon, with The International Trust Company's mortgage clause attached, a copy of said policy being attached as Exhibits A and B to and made a part of plaintiff's complaint, to which reference is hereby made. The original of this Exhibit No. 5, filed in Court, is omitted herefrom by consent of the parties.

253 No. 2085 $10,000.00

The President and Directors of the Insurance Company of North America, Philadelphia.

Founded A. D. 1792.

In consideration of the stipulations herein named, and of One Hundred and Five and no/100 Dollars Premium, Does Insure J. R. Gordon for the term of Six Months from the Sixth day of July, 1893, at noon, to the Sixth day of January 1894, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Ten Thousand Dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

This Insurance is subject to the conditions of the printed form, attached to and made a part of this policy.

$10.000. On the six story and basement, stone, brick and iron building, in course of construction, including foundations, plate glass of all sizes while set in said building, frescoed work and gilding on walls and ceilings, heating apparatus, plumbing, sewer, gas and water pipes, radiators, tiling, gas and electric light fixtures, chandeliers and electric light wiring, elevator and elevator apparatus and fixtures, and sidewalks around said building, and on all building material, supplies and machinery contained in and about above premises, and in frame carpenter shop adjoining situate on lots Nos. 8, 9, 10, 11, 12, 13, 14, 15 and 16, in Block No. 126 of the former town of South Pueblo, now City of Pueblo, Colorado,

To be occupied and known as the Hotel Mesa (lightning clause and gasoline stove permit attached to policy.)

Other concurrent insurance permitted.

Attached to and made a part of this policy No. 2085 of the Insurance Company of North America, of Philadelphia, Pennsylvania, issued at its Pueblo, Colorado, Agency. July 6th, 1893.

BENSON & KIRTLAND,
Agents.

* * * * * * *

Whereas, The property described in this Policy has been conveyed to Mahlon D. Thatcher in trust, to secure the payment of a certain indebtedness to The International Trust Company, Denver, Colorado;

And Whereas, the owner of the Policy has requested that the loss, if any, be made payable to the said Company: Therefore, the loss, if any, is made payable to The International Trust Company, Denver, Colorado, and its assigns.

It Being Hereby Understood and Agreed, That this insurance, as to the interest of the Mortgagee or Trustee only therein, shall not be invalidated by any act or neglect of the Mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this Policy. Provided, that in case the Mortgagor or owner neglects or refuses to pay any premium due under this Policy, then, on demand, the Mortgagee or Trustee shall pay the same. Provided, also, that the Mortgagee or Trustee shall notify this Company of any change of ownership or increase of hazard which shall come to his or their knowl-

edge, and shall have permission for such change of ownership or increase of hazard duly endorsed on this Policy. And Provided Further, that every increase of hazard not permitted by the Policy to the Mortgagor or owner, shall be paid for by the Mortgagee or Trustee on reasonable demand, and after demand made by this Company upon, and refusal by the Mortgagor or owner to pay, according to the established schedule of rates. It is, however, understood that this Company reserves the right to cancel this Policy, as stipulated in the printed conditions of said Policy; and, also, to cancel this agreement on giving ten days' notice of its intention to the Trustee or Mortgagee named therein, and from and after the expiration of the said ten days this agreement shall be null and void. It is Further Agreed, that in case of any other insurance upon the property hereby insured then this Company shall not be liable, under this Policy, for a greater portion of any loss sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein. It is also Agreed that whenever this Company shall pay the Mortgagee or Trustee any sum for loss under this Policy, and shall claim that as to the Mortgagor or owner no liability therefor exists, it shall at once and to the extent of such payment be legally subrogated to all the rights of the party to whom such payment shall be made, under any and all securities held by such party for the payment of said debt. But such subrogation shall be in subordination to the claim of said party for the balance of the debt so secured. Or said Company may, at its option, pay the said Mortgagee or Trustee the whole debt so secured, with all the interest which may have accrued thereon to the date of such payment, and shall thereupon receive from the party to whom such payment shall be made an assignment and transfer of said debt, with all securities held by said parties for the payment thereof.

In testimony that the foregoing provisions are made a part of Policy No. 2085, of "Insurance Company of North America," to which they are attached, witness my hand at Pueblo, Colorado, this Sixth day of July A. D. 1893.

BENSON & KIRTLAND, Agents.

Acccepted and agreed to by

THE INTERNATIONAL TRUST COMPANY.

By HENRY W. HOBSON,
Vice Pres.

(1) This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated ac-

cording to such actual cash value, with proper deduction for (2) depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if (3) they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, (4) estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company, to take all, or any part, of the articles at such ascertained or appraised value, (5) and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be (6) no abandonment to this company of the property described.

(7) This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material (8) fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not (9) truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or (10) the subject thereof, whether before or after a loss.

(11) This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the in- (12) sured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered (13) in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole (14) or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be (15) increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering, or (16) repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other (17) than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in (18) fee-simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with (19) the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this (20) policy by virtue of any mortgage or trust deed; or if any change, other

than by the death of an insured, take place in the (21) interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal (22) process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating (23) gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or (24) manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, (25) dynamite, ether, fireworks, gasolene, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine (26) or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United (27) States standard, (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, (28) provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building (29) herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for (30) ten days.

(31) This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or com- (32) motion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all (33) reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring (34) premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but (35) liability for direct damage by lightning may be assumed by specific agreement hereon.

(36) If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents (37) shall immediately cease.

(38) This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; (39) nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, (40) jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, (41) tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance (42) or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor (43) for any greater proportion of the value of plate glass, frescoes, and decorations than

that which this policy shall bear to the whole (44) insurance on the building described.

(45) If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and (46) a warranty by the insured.

(47) In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this (48) company.

(49) This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed (50) term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

(51) This policy shall be canceled any time at the request of the insured; or by the company by giving five days notice of (52) such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having having been (53) actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the (54) customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata (55) premium.

(56) If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or (57) corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the (58) conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such (59) interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, (60) that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, (61) for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such (62) excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears (63) to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be (64) liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time (65) of fire, whether the same cover in new location or not. (66)

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property (67) from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, (68) make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, (69) within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, (70) signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; (71) the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; (72) all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions (73) and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property (74) since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were (75) occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or (76) machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not (77) interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has (78) examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary (79) public shall certify. (80)

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property (81) herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, (82) as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies (83) thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall (84) permit extracts and copies thereof to be made. (85)

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent (86) and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent (87) and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and (88) damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine (89) the amount of such loss;

the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the (90) expenses of the appraisal and umpire. (91)

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any (92) requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss (93) shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein (94) required have been received by this company, including an award by appraisers when appraisal has been required. (95)

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for (96) loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole (97) insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application (98) of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by (99) agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed (100) hereon. (101)

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, (102) this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the (103) insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such (104) payment. (105)

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after (106) full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire. (107)

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and (108) wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage." (109)

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, (110) membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may (111) be written or printed upon, attached, or appended hereto. (112)

This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

In Witness Whereof, this company has executed and attested these presents this 26th day of June 1893

But this Policy shall not be valid until countersigned by the duly authorized Agent of the Company at Pueblo, Col.

CHARLES PLATT, President.

Attest: NEVILLE E. FRYER, Secretary.

Countersigned Pueblo, Col.. this 26th day of June 1893.

BENSON & KIRTLAND, Agents.

Ex. 6. For Acct. # 1026. Standard Fire Insurance Policy of the State of New York and Pennsylvania. Expires January 6th, 1894. Property Hotel Mesa. Am't $1000.00. Premium $105.00. Assured: J. R. Gordon. No. 2085. Insurance Co. of North America, Philadelphia, Pa. Commenced Business in 1792. Incorporated April 14, 1794. From Benson & Kirtland, Insurance, Swift Block, Pueblo, Colorado. It is important that the written portions of all policies covering the same property read exactly alike. If they do not they should be made uniform at once.

EXHIBIT 7.

254 This is a letter of July 6, 1893, from Gibson, Secy of Trust Company, to Benson & Kirtland, read into evidence on page 43, and the Exhibit as filed is herefrom omitted by consent of the parties.

EXHIBIT 8.

This is a letter of July 22nd, 1893, read into testimony on page 43, and the Exhibit as filed is herefrom omitted by consent of the parties.

EXHIBIT 9.

This is the portion of the abstract of title introduced in evidence, by plaintiff and shows that at the time of the loan made by Gordon in December, 1892, the title to said property was vested in John R. Gordon, in fee simple, and that the Trust deed to Mahlon D. Thatcher, given to secure said loan, constituted a valid and subsisting first lien upon the said hotel property continuously until after the fire, and the Exhibit in full is omitted herefrom by consent of the parties.

EXHIBIT 10.

* * * * * * *

(Exhibit 10. Notice of loss from International Trust Company to Insurance Company of North America, October 12, 1893).

* * * * * * *

255 EXHIBIT 11.

Philadelphia, Oct. 17th, 1893.

International Trust Company,
Denver, Colo.

Gentlemen:—

Your favor of the 12th inst., at hand advising us of loss under policy No. 20085 J. R. Gordon of Pueblo, Col., and we have referred your letter to our managers Messr's. J. F. Downing & Co., Erie, Pa., for their attention.

Yours very truly,

Received Oct. 21, 1893.
Answered.

E. L. ELLISON,
2nd Vice President.

256 EXHBIT 12.

No. of Policy 2085. Proof of loss. Amount of Policy $10,000.

To the

The Insurance Company of North America Insurance Company of Philadelphia.

By your policy of insurance No. 2085 issued at your agency at Pueblo, Colorado, commencing at 12 o'clock noon, on the 6th day of July, 1893, and terminating at 12 o'clock noon, on the 6th day of January, 1894, you insured John R. Gordon against loss and damage by fire to the amount of ten thousand dollars, according to the terms and conditions printed in said policy, the written portion, together with a correct copy of all endorsements, assignments and transfers being hereto attached marked

Exhibit "A." That cotemporaneously with the issuance of said policy, there was attached to the same, a separate agreement, by which the loss on said policy was made payable to The International Trust Company, or its assigns, a copy of which said agreement is hereto attached marked Exhibit "B," and said policy was made expressly subject to the provisions of said agreement.

The total insurance on said property, or any part thereof, at the time of the fire, including the above mentioned policy, was as claimed by us, fifty thousand dollars. For specific details of the same see apportionment schedule of other insurance hereto attached. In reference to this will say, that the claimant under this proof, actually holds in its possession the first four policies set out in said schedule, and that as to the other two, it has not possession of the same, but with regard thereto, it is claimed that the same were renewals of policies in said companies or other companies which had theretofore been held by the undersigned, and which renewals had been actually made and issued, and it is claimed by the undersigned that it is entitled to hold said insurance companies liable under such renewal policies. The entire written portion of each of the said additional policies, and all assignments, endorsements and transfers thereon, so far as the same are within the knowledge of this company, are hereto attached marked Exhibit "D."

257 A fire occurred on the 9th day of October, A. D. 1893, at about the hour of ten o'clock A. M. by which the property insured was destroyed as herein set forth, the origin of said fire being unknown to this claimant.

The actual cash value of the property thus situated and destroyed under the aforesaid policies at the time of the loss, and the actual loss and damage by said fire on the same, for which claim is hereby made, and the whole amount of insurance thereon were as follows:

Property.

The unfinished Mesa Hotel Property in course of construction.

Sound Value.

Said building represented as the undersigned is informed, an expenditure of over $140,000 in cash.

Total Insurance.

$50,000.00 as claimed.

Loss Under Insurance.

Practically total loss, there being little or no salvage.

Insured by The Insurance Company of North America, $10,000.

Claimed on the Insurance Company aforesaid, $10,000.00.

The undersigned Trust Company claims of the above mentioned The Insurance Company of North America Insurance Company, by reason of said loss, damage and policy of insurance, the sum of $10,000 dollars.

The undersigned company owns exclusively, in its own right, the debt secured by the deed of trust upon said Mesa Hotel property, and referred to in said policy of insurance in the mortgagee clause thereto attached,and is alone entitled to claim the amount due under said policy and mortgagee clause attached.

At the time of the fire, the legal title of said property was in M. D. Thatcher, trustee, for the benefit of the undersigned company, and for the purpose of securing to said company the payment of fifty thousand dollars ($50,000.00). The equity in said property at the time said insurance policy was issued, was in John R.Gordon, but since that time, and prior to the fire (as undersigned claimant is now informed), the said Gordon conveyed said property to the Mesa Hotel Company. Claimant
258 however states and alleges, that it was totally ignorant of said transfer to said hotel Company by said John R. Gordon, until after said fire had occurred, and said claimant had no notice whatsoever of said transfer.

The property insured was so far as claimant's knowledge goes, encumbered to the amount of $50,000.00 by deed of trust to M. D. Thatcher, trustee, to secure the payment to claimant, or its assigns, the sum of $50,000.00.

The destruction of said building was so nearly total, that it is impossible to estimate the value of property saved. All that is left of said building are portions of some of the walls, and the foundation. The salvage may amount to $4,000 or $5,000.

The building insured was not completed, and was not occupied by any one at the time of the fire; the same was in process of construction, and so far as claimant is informed, except as otherwise herein stated, there wns no change in the title, use, occupation, location, possession or exposure of said property after the issuing of said policy.

The said fire did not originate by any act, design, or procurement on our part nor on the part of any one having any interest in the property, insured so far as we are advised, or in the said policy of insurance, nor in consequence of any fraud or evil practice done or suffered by us, or by any other person

interested in said property; that nothing has been done by or with our privity or consent to violate the conditions of the policy, as it exists in force for our benefit, or to render it void against us; that we have no knowledge of any act done by, or with the privity or consent of the said John R. Gordon, to violate the conditions of the policy, or render it void as to him, unless his action in transferring said property to the Mesa Hotel Company was such act, and with regard to the legal effect of said act we are not advised, and of the commission of said act we had no notice, or knowledge, until after said fire had occurred; that no properties are herein mentioned except such as were insured under the policies aforesaid and that no property, or part of said hotel, has been taken away or concealed, and that no attempt to deceive the said company as to the extent of said loss or otherwise, has in any manner been made. Any other information that may be required will be furnished on call, and considered a portion of these proofs.

259 It is furthermore understood and agreed that all Exhibits, papers, schedules and statements made by the assured, and attached to this proof of loss, are to be incorporated into this proof, and are hereby duly sworn to and made a part thereof.

Witness, The International Trust Company this first day of November, A. D. 1893, its name being signed hereto by its vice president and attested by its seal affixed by its assistant secretary.

THE INTERNATIONAL TRUST COMPANY,
[Seal By Henry W. Hobson,
Vice-President.

Attest: F. B. Gibson, Asst. Secretary.

* * * * * * *

(Verified)

* * * * * * *

EXHIBIT C OF EX 12.

Apportionment Blank.

Expiration of Policy.	No. of Policy.	Name of Company.	Amount of Policy.	Amount Insured.	Amount Pays.
Jany 6, '94	2,085	The Insurance Company of North America	$10,000 00	$10,000 00	$10,000 00
Dec 14, '93	300,525	The Hanover Fire Ins. Co The Citizens (Fire) Ins Co of New York	$ 5,000 00	$ 5,000 00	$ 5,000 00
Dec 14, '93	4,475,189	Sun Insurance office of London England	$ 5,000 00	$ 5,000 00	$ 5,000 00
Dec 14, '93	2,316,642	Alliance Assurance Company of London England	$ 5,000 00	$ 5,000 00	$ 5,000 00
Apl 4, '94		Do (See proof with regard to this.)	$10,000 00	$10,000 00	$10,000 00
Feby 26, 94	Not known.	The Norwich Union Fire Insurance Society England (See proof with regard to this.)	$10,000 00	$10,000 00	$10,000 00

265 The balance of the Exhibits attached to the Proof of Loss as filed in Court, consists of the written portion of the policies of the various other insurances claimed, and are omitted herefrom by consent of the parties.

EXHIBIT 19.

Consists of the following letters and telegrams:

1893.

May 26—Cuyler, Morgan & Co. to Trust Company.
May 29—John F. Bell to Cuyler, Morgan & Co.
June 2—Cuyler, Morgan & Co. to Trust Co.
June 2—Cuyler, Morgan & Co. to Trust Co.
June 7—John F. Bell to Cuyler, Morgan & Co.
June 12—John F. Bell to Cuyler, Morgan & Co.
June 12—Cuyler Morgan & Co. to Trust Co. (Telegram).
June 12—John F. Bell to Cuyler, Morgan & Co.
June 12—Trust Co. to Cuyler, Morgan & Co. (Telegram)
June 12—John F. Bell to Guild & Shepherd.
June 12—Trust Co to Guild & Shepherd (Cablegram.)
May 31—Guild & Shepherd to John F. Bell.
June 13—John F. Bell to Guild & Shepherd.
June 14—Guild & Shepherd to John F. Bell.
June 15—Cuyler, Morgan & Co. to Trust Co.
June 26—Guild & Shepherd to Trust Co. (Cablegram).
June 26—John F. Bell to Guild & Shepherd.
June 28—Guild & Shepherd to Trust Co.
July 21—John F. Bell to Guild & Shepherd.
Aug. 5—Guild & Shepherd to John F. Bell.
Aug. 9—Guild & Shepherd to John F. Bell.
Aug. 22—John F. Bell to Guild & Shepherd.
Sept. 5—John F. Bell to Guild & Shepherd.
Sept. 22—Guild & Shepherd to John F. Bell.
Sept. 23—John F. Bell to Guild & Shepherd.
Sept. 27—Guild & Shepherd to John F. Bell.

266 As read into the testimony of Henry W. Hobson, which see.

The Exhibits as filed in Court are omitted herefrom by consent of the parties.

EXHIBIT 20.

Denver, Colo., Sept. 26, 1893.

The International Trust Company. $282.

Pay to the order of Benson, Kirtland & Co. two hundred and eighty two dollars.

THE INTERNATIONAL TRUST COMPANY.
By F. B. GIBSON,
Cashier.

No. 592

Endorsed: Benson, Kirtland & Co.

(To accompany Exhibit 20)

J. R. Gordon, To Benson & Kirtland, Dr.

1892.			
Dec. 13	To Alliance.....	105	
1893.			
Jany 31	North America.....	105	
Feby 28	Norwich Union.....	105	
March 31	National.....	105	
June 30	Alliance	105	
July 31	North America.....	105	
1892			
Dec'r 21	By cash.....		135
'93			
Feby 1	" "		90
March 31	" "		73
May 11	" "		50
Sept 26	" "		282
		630	630

267 EXHIBIT 21.

To The Insurance Company of North America,
The Sun Insurance Office,
The Hanover Fire, and Citizens Fire Insurance Companies:

You will please take notice that we herewith beg leave to correct and amend the proofs of loss heretofore filed by us upon the Mesa Hotel Property, Pueblo, Colorado, as follows:

That, whereas, in our original proofs we claimed that we held two policies of the Alliance Assurance Company for $10.000.00 each, making a total insurance as claimed by us of $50,000.00. We now claim only one policy issued by the Alliance Assurance Company for our benefit. At the time the proofs were made, and upon information which we then had, we believed and so stated that on the 4th day of October, 1893, the Alliance Assurance Company had issued a second policy, and which was in full force and effect at the time of the fire. From information since derived, we are satisfied that we were mistaken, and we have no legal claim against the Alliance Assurance Company upon such policy, and we furthermore beg leave to notify you that the Alliance Assurance Company has paid in full the first policy issued for our benefit, as shown in our proofs.

THE INTERNATIONAL TRUST COMPANY.
By HENRY W. HOBSON,
Vice President.

State of Colorado
County of Arapahoe—ss.

Henry W. Hobson, being first duly sworn deposes and says, that he has read the foregoing notice and knows its contents and that the matters and things therein set out are true of his own knowledge, except such matters and things as are stated on information and belief, and in regard to those he verily believes them to be true.

(Seal). HENRY W. HOBSON.

Subscribed and sworn to before me this 16th day of January, A. D. 1894.

My commission expires March 8th, 1897.

FRANK B. GIBSON, Notary Public.

268 EXHIBIT 27.

Consists of those portions of the Proofs of Loss of John R. Gordon introduced in evidence, and appears in bill of exceptions. Read into evidence by counsel for Defendant on page 105. The said Exhibit as filed in Court is omitted herefrom by consent of the parties.

EXHIBIT 32.

This is the portion of the abstract of title introduced in evidence by defendant and shows that the title and interest of John R. Gordon in said property was on July 3, 1893; transferred and conveyed to The Mesa Hotel & Improvement Company by deed of that date, recorded on July 3, 1893, as shown by the extracts read by counsel from said abstract on page 104. The Exhibit itself is omitted herefrom by consent of the parties.

EXHIBIT 33.

Denver, Colo., January 20th, 1894.

Henry W. Hobson, Esq.,
Vice President International Trust Co.,
Denver, Colo.

Dear Sir:—

I beg to enclose herewith communication from Messrs. J. F. Downing & Co., General Agents of the Insurance Company of North America, which I have been instructed on behalf of the Company to transmit to you.

You will note what Mr. Downing says, relative to the investigation of this claim, and to the serious doubt that we now entertain in regard to the liablity of this company. Further-

more, you can not fail to appreciate the statement that
269 unless the company is legally liable under its policy for the loss in question there can exist no good reason why it should entertain the claim.

As an attorney doubtless quite conversant with insurance cases, you will be qualified to understand why we should proceed carefully in a matter of this sort. We realize the propriety of treating courteously with claimants and not to misle-d or subject them to inconvenience or unnecessary trouble.

We desire to treat with you frankly in this matter but we cannot afford to jeopardize rights which may exist between us under the conditions of our policy.

Upon information we have been led to believe that facts involved in this case, are at material variance with statements made in the claim for loss presented by you, both in respect to the value of the property destroyed, and as to a number of matters which go to affect the question of our liability. We are also led to believe upon recent advices that our policy has never been a subsisting contract in favor either of your company or of Mr. Gordon.

Having sought to secure the information and advice necessary to determine the questions which have been thus presented, for our consideration, we shall endeavor to reach a conclusion, without subjecting you to any trouble or expense.

As it may require some time yet for the purposes of our inquiries we beg to say: that it is not our intention or desire to retain the premiums or considerations paid by you or Mr. Gordon, for this policy, unless it should be determined that the policy is clearly a valid contract.

We are prepared, therefore, pending further investigation, and at any time, to refund the full premium paid upon this policy, with interest thereon from date of payment. The company will honor your demand therefor through the undersigned or at either its Denver or Pueblo agency.

Very truly yours,

M. V. B. BENSON,
State Agent.

270 EXHIBIT 34.

Denver, Colorado, Jan. 23rd, 1894.

M. V. Benson, Esq.
State Agent Insurance Company of North America.
Cooper Building, City.

Dear Sir:

Your letter of Jan. 20th duly received, and enclosure from Messrs. J. F. Downing & Company, and I note what you say upon the subject. I of course desire that your Company shall

have every opportunity to investigate the subject of the Mesa Hotel fire, and to get full information in regard to the same, and I do not desire that you should in any way jeopardize your rights.

Relating to the various points concerning which you state you have had no information, I beg leave to say that we emphatically deny the correctness of your information; at the same time we shall not show any unreasonable haste in bringing suit, but will wait some time longer, hoping that your company upon full consideration, and information, will take the same course that the Alliance Company took, after having had an agent investigate the matter for a considerable time. There is no ground upon which your company could claim a defense against our rights that did not also appertain to the Alliance Insurance policy.

With reference to your offer to refund us premium, of course we cannot accept that, as we hold that you are responsible to us for the full amonnt of the policy issued by you.

I shall communicate with you before taking any action, and give you full opportunity to settle the matter without suit.

Very truly yours,

HENRY W. HOBSON G.
Vice President.

EXHIHIT 35.

Erie, Pa. Jan. 27th, 1894.

Received Jan. 31, 1894

Answered

271 Henry W. Hobson, Esq. V. P.
International Trust Company,
Denver, Colo.

Dear Sir:

Your letter of the 23rd inst. has been received, and same has had our careful attention.

Our position in the case in question is very similar to your own. You represent the "International Trust Company", and are under obligations to protect the legal rights of that corporation: while on the other hand we represent the "Insurance Company of North America," and are in duty bound to protect its legal rights as best we can. We take it for granted that both parties are seeking to do no more than their duty in the matter; and we are pleased to know that there is every p ospect of our being able to discuss the case in a spirit of mutual respect and friendliness.

As before advised, we have given instructions to our Mr. Benson, to investigate carefully the facts and circumstances of the case, with the view of reaching a conclusion as to the legal liabilities of this company; and when this duty has been duly attended to, we will feel it incumbent upon us, as the representatives of our company, to place the whole case in the hands of the officers of the company in Philadelphia, for instructions.

Yours very truly,

J. F. DOWNING & CO.
G. Agts.

EXHIBIT 36.

Denver. Colo. January 20th, 1894.

John R. Gordon, Esq.
Pueblo, Colo.,

Dear Sir:

From an examination of papers presented by you in which you make a claim for loss under Policy No. 2085 of The Insurance Company of North America for the loss upon the Mesa Hotel, we are compelled to say that it does not appear to the satisfaction of the company that any liability exists in your favor under said policy.

272 We must decline therefore to recognize your claims. In regard to the premium paid upon this policy, we have already notified the International Trust Company that the premium will be refunded on demand and we beg to advise you to the same effect.

Very truly yours,

M. V. B. BENSON, S. A.

Recd by J. R. Gordon Feb. 1st 94.

EXHIBIT 37.

N. Y. Standard.

Mortgagee clause with full contribution.

Loss or damage, if any, under this policy, shall be payable to ..... as ..... mortgagee (or trustee) as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings, [nor by any foreclosure or other proceedings] or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; pro-

vided that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

Provided, also, that the mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

This company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation and shall then cease, and this company shall have the right on like notice, to cancel this agreement.

273 In case of any other insurance upon the within described property, this company shall not be liable under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee or otherwise.

Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may at its option pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of .... claim.

Dated .....

Attached to and forming part of Policy No. ....., Western Assurance Company.

John R. Gordon,
Board of Trade Bldg Pueblo, Colo.

Loan No 1026
Amount $50,000.00 "For acct." Investor's Mortgage.
Maturity June 12, 1893.

10% from 12 June 1893
Int 7 p. c. per annum.
Payable Semi-annually
Due $1750.00 June 12, 1893.

Ground $ 50,000.00
Valuation Improvements 200,000.00

50,000
Insurance ~~60,000.00~~

DESCRIPTION OF PROPERTY.

Lots 11 to 16 inclusive Block #126, South Pueblo (Colo) with six story and basement stone, brick and Iron Hotel to be [—] as The Hotel Mesa.

Date, Dec 12, 1892.

Date Due.		Interest.	Principal.	Date Paid.		Interest.	Principal.
1893 June 12	To amount due	1750		1893 June 12	By Cash	1750	
	Interest by us under				Interest by us under		
Sept 12	Interest due by us [unde]	875		Sept 25	Interest paid by us under	875	
	our repurchase				our repurchase		
	our repurchase	2625			our repurchase	2625	
Repurchased	from Investors Mortgage Security Co Ld			12 June 1893, and carried back to page 42		loan No 541.	

Repurchased from Inve. M. Sec. Co. June 12th, 1893, and carried back to p. 42, loan 541.

(NOTE.—The portions shown in red ink are in pencil marks in the original.)

EXHIBIT "A."

-275

John R. Gordon, Pueblo, Colo.

Loan No. 541.
Amount $50.000.
Maturing June 12, 1893.

Int. 7 p. c. per annum
Payable semi-annually.
Due 1750.00 June 12, 1893.

Ground 50,000
Valuation $ Imp. 200,000

DESCRIPTION OF PROPERTY.

Insurance $60,000.00

Lots 11 to 16 inc. Block #126 South Pueblo, with six story and basement, stone brick and iron hotel to be known as the Hotel Mesa.

Date Due.		Interest.	Principal.	Date Paid.		Interest.	Principal.
	[Transferred to	Page No. 375	Loans for	"Acct"]			
Repurc	hased of Investors	Mortgage S	ecurity Co	Ld 12 June 1893.			
1893							
Sept 12	To amount due	1,250		1893 Sept 25	By Cash 7%	875	
				1894 Jan 17	3%	375	
1894 Jan 12	4M at 10%	1,666 67		17	10%	1,666 67	
12			6,034 58	17			6,034 58
				1895 Feb 20 at 8% after allowing rebate of $333.34 on 17" Jany payment.			
July 12	$ 5000, 5 days at	10%					
	43,965, 176 " "	10% 2,188 40				3,559 68	
1895 Feb 20	No "	10% 2,677 88					

(NOTE.—The portions shown in red ink are in pencil marks in the original.)

THE INTERNATIONAL TRUST CO.

276 And for as much as the foregoing matters do not fully appear of record, the plaintiff herewith tenders this its bill of exceptions and prays that the same may be made a part of the record in said cause. Which is according – – done this 4th day of May, A. D. 1896.

JOHN A. RINER,
Judge.

Approved:

A. C. CAMPBELL,
Atty. for Plaintiff.

Indorsed—No. 3060. The International Trust Company vs. The Insurance Company of North America. Bill of Exceptions. Filed May 6, 1895. Robert Bailey, Clerk U. S. Circuit Court.

277 In the United States Circuit Court of Appeals for the Eighth Circuit.

ASSIGNMENT OF ERRORS.

The Insurance Company of North America, Plaintiff in Error.

vs.

The International Trust Company, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Colorado.

Now comes the plaintiff in error in the above entitled action and for cause of error why the judgment of the court below should be reversed makes the following assignment of errors, to-wit:

I.

The court below erred in over-ruling the objection of the defendant below to the introduction of any evidence for the reason that the complaint does not state facts sufficient tc constitute a cause of action against the defendant.

II.

The court below erred in refusing to grant defendant's motion for judgment upon the evidence.

III.

The court below erred in making the 9th special find-
278 ing of fact, to-wit:

"That in pursuance of such authority the International Trust Company did on the 12th day of June, 1893, reacquires title to the note of said John R. Gordon by re-purchase, and did re-acquire an insurable interest in and to the

property covered by the policy of insurance issued by defendant company; and the said Trust Company, on the 12th day of June, 1893, did actually pay to the said Investor's Mortgage Security Company the sum of $1750, being part of the amount due upon re-purchase, and did assume the payment of the balance of the purchase price, viz:—$50,000, and did from that time on treat and dispose of said note as its own property. That although said note has never been foreclosed no definite extension of the same has ever been given, and the same has remained in default ever since the 12th day of June, 1893."

For that said special finding is a conclusion of law from the evidence and should not be made as a finding of fact: It appearing from the evidence that the entire negotiation relative to the repurchase of the Gordon note by the International Trust Company was conducted by correspondence which is in evidence and fully set forth in the record. And because no evidence to establish said findings was produced in the said Circuit Court.

IV.

The court below erred in refusing the request of the defendant below to rule as a matter of law upon the evidenee that the correspondence between the International Trust Company and the Investor's Mortgage Security Company, Limited, relative to the re-purchase of the Gordon note by the Inter-
279 national Trust Company and upon all of the testimony relative thereto, the ownership and title to the said Gordon note did not vest in the International Trust Company until after the issuing of defendant's policy.

V.

The court below erred in refusing to rule as a matter of law from the evidence that the International Trust Company did not have an insurable interest in the property or in the indebtedness at the time of the issuing of defendant's policy.

VI.

The court below erred in refusing the request of defendant to rule as a matter of law that the International Trust Company as shown by the evidence did not have such insurable interest either in the property or in the indebtedness as was sufficient in law to sustain the policy and did not have the insurable interest required by the terms of the policy, and mortgage clause.

VII.

The court below erred in ruling that the ownership and title of the Gordon note did vest in the International Trust Company prior to the issuance of defendant's policy.

VIII.

The court below erred in ruling that the International Trust Company did have an insurable interest in the property and indebtedness at the time the policy of defendant was issued.

280 IX.

The court below erred in ruling that the International Trust Company did have the interest in the property and indebtedness required by the terms of the policy and mortgage clause.

X.

The court below erred in making the 8th special finding, to-wit:—

"On the 12th day of June, 1893, when the loan of the said John R. Gordon became due and payable, he being unable to pay the same, and the holder of his said note demanding payment, the International Trust Company, by its executive committee, determined to re purchase said loan, and authorized the officers of said company to so re-purchase it."

For the reason that there is no evidence to support said finding.

XI.

The court below erred in making the 10th special finding, to-wit:—

"That by agreement between the International Trust Company and the said Investor's Mortgage Security Company, the International Trust Company was given time wherein to make the payment of the balance of $50,000. upon the re-purchase price, as aforesaid, and it did thereafter pay said amount in full to the Investor's Mortgage Security Company, with interest thereon at 7 per cent. from the 12th day of June, 1893, to September 12th, 1893, and at the rate of 9 per cent. from September 12th to date of payment."

For that there is no evidence to sustain said finding.

XII.

281 The court below erred in making that portion of the 12th special finding, to-wit:—

"That the said William B. Shephard on the 14th day of June, 1893, had been for a long time the confidential clerk and office man of the said firm of Benson & Kirtland; attended to most of the inside work of said office, had power and author-

ity to perform and transact most of the business of said office except the actual countersigning of policies. Had authority to represent said Kirtland with patrons of the office and parties seeking insurance, to accept risks according to the general rules of the office, except for premiums, and generally to do and perform the insurance business of the office, with the exception of countersigning policies; that the patrons of the office had been accustomed to deal with the said Shephard in regard to insurance issued therefrom, and had no notice or knowledge of any limitation upon his authority in regard to such business."

For that the said special finding is not sustained by any evidence.

XIII.

The court below erred in making the 14th special finding of fact, and especially that portion of said finding, as follows:

That "The agent of defendant company in issuing such renewal dealt directly with the International Trust Company, and with the understanding and knowledge that such policy of insurance with mortgagee clause attached was issued for the benefit and protection of said Trust Company; and furthermore after the 6th day of July, 1893, and prior to the time when the property insured was destroyed by fire the agent of defendant company dealt directly with the International Trust Company, and it was understood that said policy of insurance was in existence and was being carried for the benefit and protection of the International Trust Company as owner of the note of John R. Gordon aforesaid."

282 Because there is no evidence to sustain said finding.

XIV.

The court erred in making the 21st special finding, and particularly that portion thereof as follows:

"Said proofs of loss were in accordance and complied with the requirements of the provisions of the policy of insurance aforesaid."

It appearing from the evidence that on the 16th day of January, 1894, the plaintiff made of its own motion a material amendatory and supplemental proof.

XV.

The court below erred in making the 23d special finding of fact, and especially that portion thereof, as follows:

"That the mistake aforesaid was made in good faith and in advertently and was immaterial, and did not in any wise affect the validity of the original proofs as filed. And did not in any wise prejudice defendant company in its determination as to the payment or refusal of payment of said policy."

For the reason that there is no evidence to support the said finding.

XVI.

The court below erred in making that portion of the 24th special finding of fact, to-wit:—

"That defendant company, by all of its actions and conduct from the time of said fire and shortly after, denied its liability under said policy upon grounds foreign to the mat
283 ter of proofs of loss and arising out of transactions occurring before the fire. And the defendant company did by and through its agents, prior to the bringing of suit in this action, deny its liability under said policy upon grounds and matters arising prior to the destruction of the said hotel property:"

For the reason that there is no evidence to support said portion of said special finding.

XVII.

The court below erred in making that portion of the 25th special finding, to-wit:—

"Nor was there ever, so far as the evidence shows, any difference between the International Trust Company and defendant company concerning the amount of loss:"

For that there is no evidence to support said portion of the 25th special finding.

XVIII.

The court below erred in making the 26th special finding, to-wit:—

"That suit was begun by the International Trust Company on the 16th day of February, 1894, more than sixty days after the proofs of loss had been furnished by the International Trust Company to defendant company:"

Because there is no evidence to sustain the finding that sixty days had expired from the furnishing of proofs of loss.

XIX.

The court below erred in finding as a matter of law that the plaintiff company is entitled to a judgment against
84 the defendant company under said policy.

XX.

The court below erred in refusing to make as a substitute for and in lieu of the 5th special finding, the finding requested by the defendant, to-wit:—

"That on or about the 29th day of December, 1892, the International Trust Company sold and transferred, and endorsed without recourse, to the Investor's Mortgage Security Company, Limited, of Scotland, said note of John R. Gordon; and of the sale and transfer of said note no notice was ever given to defendant Company:"

Because the evidence shows the facts to be as defendant requested the court to find.

XXI.

The court below erred in refusing to make as a substitute for and in lieu of the 7th special finding, the finding requested by the defendant, to-wit:—

"That prior to the 12th day of June, 1893, the said Investor's Mortgage Security Company, Limited, of Scotland, had transmitted the Gordon note to the International Trust Company for collection, the same being received for collection on June 7th, 1893, and said Investor's Company had informed the International Trust Company that on the repayment of the Gordon loan on the 12th day of June, they should require the money at their bankers in New York; and the Trust Company thereupon and on the 12th day of June, so notified the said Gordon:"

Because the evidence shows the facts to be as defendant requested the court to find.

XXII.

The court below erred in refusing to make as a substi-
285 tute for and in lieu of the 11th special finding, the finding requested by the defendant, and particularly that portion of the finding requested, which is as follows:

"That said William B. Shephard on the 14th day of June, 1893, had been for some time past, policy clerk and book-keeper in the office of Benson & Kirtland with such power and authority as attached to that position; but without any authority to make contracts of insurance or to countersign policies, or to deliver policies without the authority of Kirtland, or to accept risks except upon the approval of said Kirtland; to receipt for premiums, and generally to do and perform such duties as are incident to the capacity of policy clerk and book-keeper, in which capacity he was employed:"

Because the finding as made by the court is not supported by the evidence, whereas the evidence shows the facts to be as defendant requested the court to find.

XXIII.

The court below erred in refusing to make as a substitute for and in lieu of the 14th special finding, the special finding requested by the defendant, to-wit:

"On the 14th day of June, the Vice-president of the International Trust Company informed the clerk Shephard that the loan of the said John R. Gordon was in default and unpaid; and that the International Trust Company owned the note. There is no evidence as to whether upon issuing the policy in suit said policy was sent directly to the International Trust Company or whether it was sent by Gordon. But all dealings so far as J. H. Kirtland, the agent of the company, was concerned with respect to the policy in suit were had with John R. Gordon. The agent of the company, J. H. Kirtland, declined repeatedly to correspond with or deal with the Interna-
286 tional Trust Company directly in reference to this insurance, but insisted at all times in dealing with John R. Gordon:"

Because the finding made by the court is not sustained by the evidence, whereas the evidence shows that the facts were as defendant requested the court to find.

XXIV.

The court below erred in admitting against the objection of defendant the testimony of the witness Gordon as to the value of the property destroyed: Because the policy provides that the value or amount of loss must be determined by an arbitration or appraisement as a condition precedent and it is [imcompetent] to prove in this action the value of the property or amount of loss independent of the appraisement, unless it be shown that the appraisement was waived.

XXV.

The court below erred in the admission of the evidence of the witness Gordon, as follows:

"Q. How much money has been expended on this building before it was burned down? Defendant objects because it is not the way to prove the value of the property. A. More than $100.000. Q. More than $100.000 had been expended?"

XXVI.

The court below erred in admitting the evidence of the witness William F. DeCamp as to the value of the property destroyed, against the objection of the defendant.

287 XXVII.

The court below erred in its ruling in refusing to admit the evidence offered of the witness Benson, to-wit:

Q. Are you familiar with the usages of current underwriting regarding the use of the mortgage clause in insurance? A. Yes, sir. Q. I will ask you [you] what is the usage and what is particularly the usage of the Insurance Company of North America in practice relative to the use of the mortgage clause as to the form of mortgage clause which is used?

This testimony being offered for the purpose of showing that the mortgage clause used in this particular case is not the mortgage clause which is used in current under-writing with respect to certain particulars which are material to the issues. That it is a mortgage clause which is prepared by the International Trust Company with respect to those particulars.

XXVIII.

The court below erred in refusing to allow the witness H. T. Lamey to testify in what respect the mortgage clause attached to the policy sued upon differs from the Standard or "Union" mortgage clause. (See Exhibit 37).

Q. Mr. Lamey, will you look at this mortgage clause attached to policy (Exhibit 6) the policy in suit—I will ask—will you state Mr. Lamey in what respect the mortgage clause attached to that policy differs from the Union mortgage clause?

And in refusing to allow the same witness to testify as to the use of the words "mortgagee" and "trustee" in
288 juxtaposition in the Union mortgage clause, viz:

Q. I will ask you, Mr. Lamey, to look at the body of the clause attached to the policy which is printed solid, in Brevier, they call that type do they not—state whether the provisions printed in that portion of the contract referred to are the provisions of the Standard mortgage clause?

Q. I will ask you, Mr. Lamey, with reference to the use of the words in the body of the mortgage clause referred to in the Union mortgage clause---the words "mortgagee or trustee,"--for what purpose and with what intent are these two words incorporated in the mortgage clause?

The evidence of this witness as to the use of the two words "mortgagee" and "trustee" in connection with each other being tendered to show that the Standard or Union mortgage clause is used by underwriters in current underwriting throughout a large territory, covering a number of states, in which a variety

of forms and securities are used—in some states mortgages and in others trust deeds. That this mortgage clause is prepared with reference to use in a variety of states and circumstances. That the word "mortgagee" is used in the case of a mortgage and "trustee" in the case of a trust deed, according to the security which is used, and the other is either superfluous or is erased, according to the circumstances and the nature of the securities. That these clauses are printed by the insurance companies and distributed among their agents in the various states using these various forms of securities.

And in refusing to admit the evidence tendered of the
289 witness Lamey, as follows:—

Q. I will ask you, Mr. Lamey, as to the usage in current underwriting in case of the trust deed, and a trustee under a trust deed, as to whom the loss is made payable to?

The testimony of the witness being offered to prove that in current practice in underwriting with reference to trust deeds and the loss payable clause, where the loss is to be made payable for the benefit of the holder of the securities, the loss is made payable to the trustee. And that in respect to the policy in suit the mortgage clause in question differs from the Union mortgage clause in current underwriting in that it is made payable in this case direct to the payee of the note.

XXIX.

The court below erred in entering judgment upon the pleadings and evidence in the said cause in favor of the plaintiff below, the defendant in error, and against the defendant below, the plaintiff in error.

SYLVESTER G. WILLIAMS &
WELLS, TAYLOR & TAYLOR,
Counsel for Plaintiff in Error.

(Indorsed). 3060. In the U. S. Circuit Court of Appeals for the Eighth Circuit. The Insurance Company of North America, Plaintiff in Error, vs. The International Trust Company, Defendant in Error. Assignment of Errors. Filed May 6, 1895. Robert Bailey, Clerk U. S. Circuit Court. Sylvester G. Williams, Attorney for Defendant in Error.

* * * * * * *

292 Filed June 15, 1895. John D. Jordan, Clerk.

[Transcript page 169.]

And on the fifteenth day of June, A. D. 1895, an appearance of counsel for plaintiff in error was filed in said cause in the following words, to-wit:

In the United States Circuit Court of Appeals, for the Eighth Circuit.

The Insurance Company of North America, Plaintiff in Error,
vs.
The International Trust Company, Defendant in Error.

APPEARANCES FOR PLAINTIFF IN ERROR.

John D. Jordan, Esq.,
Clerk U. S. Circuit Court of Appeals.

Dear Sir:—Please enter appearances of Sylvester G. Williams and E. T. Wells, M. F. Taylor and John G. Taylor, as attorneys for plaintiff in error in the above entitled cause.

Very truly yours,
SYLVESTER G. WILLIAMS,
WELLS, TAYLOR & TAYLOR,
Attorneys for Plaintiff in Error.

Denver, Colo., June 13th, 1895.

Endorsed: "No. 660. In the United States Circuit Court of Appeals, Eighth Circuit. The Insurance Company of North America, Plaintiff in Error, vs. The International Trust Co., Deft. in Error. Appearances for Plaintiff in Error. Filed Jun. 15, 1895. John D. Jordan, Clerk. Sylvester G. Williams, E. T. Wells, M. F. Taylor & John G. Taylor, Attys. for Plaintiff In Error."

And on the third day of July, A. D. 1895, an appearance of counsel for Defendant in Error was filed in said cause in the following words, to-wit:

[Transcript page 170.]

United States Circuit Court of Appeals, Eighth Circuit.

No. 660, May Term, 1895.

The Insurance Company of North America, Plaintiff in Error.

vs.

The International Trust Company.

The clerk will enter my appearance as Counsel for the Deft. in Error.

A. E. PATTISON.
A. C. CAMPBELL.

Endorsed: "United States Circuit Court of Appeals, Eighth Circuit. May Term, 1895. No. 660. The Insurance Company of North America, Plaintiff in Error, vs. The International Trust Co. Appearance filed July 3, 1895. John D. Jordan, Clerk. A. E. Pattison, A. C. Campbell, counsel for Defendant in Error."

And on the sixteenth day of October, A. D. 1895, in the record of the proceedings of said court is an order of submission of said cause in the following words, to-wit:

United States Circuit Court of Appeals, Eighth Circuit. May Term, 1895. Wednesday, October 16, 1895.

The Insurance Company of North America, Plaintiff in Error.
No. 660. vs.
The International Trust Company, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Colorado.

This cause having been called for hearing in its regular order argument was commenced by Mr. Sylvester G. Williams for Plaintiff in Error, continued by Mr. A. C. Campbell for Defendant in Error, and concluded by Mr. M. F. Taylor for Plaintiff in Error.

Whereupon, this cause was submitted to the Court on the transcript of record from said Circuit Court and the briefs of counsel filed herein.

[Transcript page 171.]

And on the second day of December, A. D. 1895, an opinion of said Circuit Court of Appeals was filed in said cause, in the following words, to-wit:

[Transcript page 172.]

UNITED STATES CIRCUIT COURT OF APPEALS

EIGHTH CIRCUIT.

No. 660.—DECEMBER TERM, A. D. 1895.

The Insurance Company of North America, Plaintiff in Error.

vs.

The International Trust Company, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Colorado.

No. 663.—DECEMBER TERM, A. D. 1895.

The Sun Insurance Office, of London, England, Plaintiff in Error,

vs.

The International Trust Company, of Denver, Colorado, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Colorado.

Mr. Sylvester G. Williams and Mr. M. F. Taylor (Mr. E. T. Wells and Mr. John G. Taylor were with them on brief) for the Insurance Company of North America.

Mr. Milton Smith (Mr. T. J. O'Donnell and Mr. W. S. Decker were with him on brief) for the Sun Insurance Office.

Mr. A. C. Campbell (Mr. A. E. Pattison was with him on brief) for defendant in error.

Before Caldwell, Sanborn and Thayer, Circuit Judges.

Thayer, J., delivered the opinion of the court.

These were suits brought by the International Trust Company, of Denver, Colorado, the Defendant in Error, against the Insurance Company of North America and the Sun Insurance Office, of London, England, the Plaintiffs in Error, to enforce the payment of two policies of insurance which were issued by the respective companies to one John R. Gordon, but with a mortgage clause thereto attached which made the loss under the policies payable to the International Trust Company, of Denver, Colorado, and its assigns, which company is

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hereafter referred to for convenience as the Trust Company. The suits grew out of the same loss, and involve a consideration of the same facts which were considered by this court in the case of The International Trust Company of the City of Denver vs. The Norwich Union Fire Insurance Society, *ante* page —.

The present suits, however, were actions at law on policies that had been duly executed and delivered to the Trust Company prior to the occurrence of the loss. On the trial of the cases a jury was duly waived, and the Circuit Court at the conclusion of the trial made and filed a special finding of facts which forms a part of the record in each case. It is unnecessary to set out the special finding of facts in full, as the finding on most of the issues is conceded to be correct. It is also conceded that the facts as found fully support the judgments which were rendered against the respective insurance companies. The chief contention in these cases is that when the policies in suit were issued the Trust Company had no insurable interest in the insured property. That contention is based on the same state of facts which formed the basis for a similar contention in the case of The International Trust Company vs. The Norwich Union Fire Insurance Society, namely, on the ground that the Trust Company had not reacquired the Gordon note for fifty thousand dollars and the deed of trust securing the same when the policies in suit were issued, and for that reason had no such insurable interest as would suffice to support the policies. The Circuit Court found, however, "that * * * the International Trust Company did on the twelfth day of June, 1893, reacquire title to the note of said John R. Gordon by repurchase, and did reacquire an insura-

ble interest in and to the property covered by the policy of insurance issued by defendant company; and the Trust Company did on the twelfth day of June, 1893, actually pay to the said Investor's Mortgage Security Company the sum of $1,750, being part of the amount due upon repurchase, and did assume the payment of the balance of the purchase price, viz., $50,000, and did from that time on treat and dispose of said note as its own property."

This finding by the trial court is conclusive in this court and cannot be reviewed. It matters not, we think, that the finding in question is based largely upon letters and telegrams which passed between the Trust Company and the Investor's Mortgage Security Company, and upon deductions drawn from such correspondence. A special finding of fact, as was said by Mr. Justice Miller in Burr vs. Des Moines Nav. & R. R. Co., 1 Wallace, 99, 102, "is a statement of the ultimate facts or propositions which the evidence is intended to establish, and not the evidence on which those ultimate facts are supposed to rest. The statement must be sufficient in itself, without inferences or comparisons, or balancing of testimony, or weighing evidence, to justify the application of the legal principles which must determine the case. It must leave none of the functions of a jury to be discharged by this court, but must have all the sufficiency, fullness and perspicuity of a special verdict. If it requires of the court to weigh conflicting testimony, or to balance admitted facts, and deduce from

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these, the propositions of fact on which alone a legal conclusion can rest, then it is not such a statement as this court can act upon." See also Hinkley vs. City of Arkansas City, 69 Fed. Rep., 768, 771; Id., — U. S. App. —. It results from this view that when a trial court is called upon to state the ultimate propositions or facts established by the evidence, in the form of a special finding, it will often be compelled to embody in the finding some legal inferences as well as inferences of fact. Such will generally be the case when, as in the present instance, the ultimate fact to be found relates to the acquisition or ownership of property. We think, therefore, that the conclusive effect of a special finding of fact cannot be made to depend upon the character of the proof upon which it rests.

If such a finding is regarded as conclusive and not subject to review when it rests upon oral testimony, it must be regarded as equally conclusive when it rests on written evidence, or on evidence that is in part written and in part oral. The rule is inflexible in the Federal Courts that when a jury is waived and the court makes a special finding, an appellate court cannot look into the evidence on which the finding is based, except for the purpose of ascertaining whether an error was committed in admitting or excluding testimony. Stanley vs. Supervisors of Albany, 121 U. S. 535, 547; Walker vs. Miller, 19 U. S. App. 403; Id., 8 C. C. A. 331; Searcy County vs. Thompson, 13 C. C. A. 349. In the present cases no objection was made to the evidence on which the finding in question was based, nor was the court asked to reject or to exclude the evidence after it had been introduced, on the ground that it had no tendency to show that the Trust Company had an insurable interest in the insured property when the policies in controversy were issued. On the contrary, the case was tried on the evident assumption that the evidence in question had some tendency to establish the existence of an insurable interest, and the objection now urged is in substance that the finding made by the trial court was against the weight of evidence. It goes without saying that we cannot notice an objection of that character. Hartford Life Annuity Ins. Co. vs. Unsell, 144 U. S. 439, 451.

But even if the special finding now under consideration was open to review by this Court, we should not be able to say that the Circuit Court erred in finding that the Trust Company had such an insurable interest as was sufficient to support the policies. In the case of The International Trust Company vs. The Norwich Union Fire Insurance Society, we have held that the Trust Company had an insurable interest on June 26, 1893, by virtue of the consummated agreement with the Investor's Mortgage Security Company to take up the Gordon note, which was secured by a deed of trust on the insured property. It was further shown in these cases that on June 12, 1893, the Trust Company had advanced and paid the interest on said note, amounting to $1,750, and we think it most probable, in view of the relations then existing between the Trust Company and the Mortgage Company, that the pay-

ment so made gave to the former company such an interest in the note and deed of trust as would serve to support a policy covering the mortgaged property which was taken out after that date.

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There are no other questions arising upon the record in these cases which can be considered in view of the special finding of facts and in view of the recent decision of this court in the case of The Syndicate Insurance Company vs. Bohn, 12 C. C. A. 531; — U. S. App. —.

In that case this Court held that a mortgage clause such as was attached to each of the policies in suit, had the effect of creating a new contract between the mortgagee and the Insurance Company, which was dependent for its validity solely upon the conduct of the company and the mortgagee, and was unaffected by any act or neglect of the mortgagor of which the mortgagee was ignorant, whether such act was done or omitted prior or subsequent to the execution of the mortgage clause. To that ruling we still adhere, and it results from that view of the effect of the mortgage clause that the policies in suit were not rendered invalid by the sale and conveyance of the mortgaged property by Gordon, the mortgagee, on or about July 3, 1893. In the policy issued by the Sun Insurance Office, of London, England, there appear to have been two mortgage clauses attached to the policy. The first of these clauses was as follows: "Loss, if any, payable to M. D. Thatcher, trustee for the International Trust Company of Denver, Colorado, as his interest may appear," whereas by the second mortgage clause the loss was made payable directly to the International Trust Company. The second clause is a more full and complete contract between the mortgagee and the Insurance Company, being in substance the same mortgage clause that was construed by this court in Syndicate Insurance Company vs. Bohn, supra.

The point is made that the first of these mortgage clauses controls the second, and that as the first clause does not exempt the Trust Company from liability for the acts of the mortgagor, the policy of the Sun Insurance Office was avoided by the sale made by the mortgagor on July 3, 1893. We cannot assent to this view. The second mortgage clause

being more full and complete, and the last apparently to be attached to the policy, should be taken, we think, as containing the latest expression of the intentions of the contracting parties. We are of opinion, therefore, that the last clause supersedes and controls the former so far as they are in conflict. The result is that the judgment of the Circuit Court in each of the cases now under consideration must be affirmed.

Sanborn, J., concurring.

I am unable to concur in the view taken by the majority of the court, that the question whether or not there was any evidence sufficient to support a finding that the International Trust Company of Denver, the defendant in error, had an insurable interest in the property destroyed, was not presented for our consideration by the record in these cases. At the close of the evidence counsel for plaintiff in error moved the court for a finding and judgment in its favor, "upon the ground that the evidence is insufficient to show a cause of action in favor of the plaintiff company, or to support a finding for the plaintiff company, or to support a judgment entered upon such finding for

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the plaintiff company," and this motion was denied and an exception to this ruling of the court was taken. In my view, this motion had the same effect that a request to the court to instruct the jury peremptorily to find for the defendant would have had if the trial had been before a jury. It is not necessary to pass upon the weight or the sufficiency of the evidence to determine this question of law. It is to be decided like a question which arises upon such a request to the jury—upon the concession that the motion must be denied if there is evidence in the record sufficient to sustain a finding for the plaintiff. Rev. Stat., sec. 700; Clement vs. Insurance Co., 7 Blatch. 51, 53, 54, 58; Lehnen vs. Dickson, 148 U. S. 71, 72, 78; Martinton vs. Fairbanks, 112 U. S. 670, 672, 674; St. Louis vs. Western Union Tel. Co., 148 U. S. 92, 96; Mercantile Trust Co. vs. Wood, 8 C. C. A. 658; 60 Fed. Rep. 346, 348; Searcy County vs. Thompson, 13 C. C. A. 349, 354 to 358; 66 Fed. Rep. 92.

As all the evidence relating to the insurable interest of the defendant in error consisted of letters contained in the record,

this motion in my view raised the question whether or not all reasonable men upon the perusal of these letters would, in the exercise of a sound and unprejudiced judgment, come to the conclusion that these letters did not show that the defendant in error had an insurable interest in the property destroyed. The opinion of the trial judge and the opinion of the judges of this court upon this question in the International Trust Company of the City of Denver vs. The Norwich Union Fire Insurance Company, ante, page —, and in these cases, foreclose the consideration of this question, and on that ground I concur in the result here.

Filed December 2, 1895.

[Transcript page 177.]

And on the second day of December, A. D. 1895, in the record of the proceedings of said court, is an entry of judgment in said cause in the following words, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

December Term, 1895.

Monday, December 2, 1895.

The Insurance Company of North America, Plaintiff in Error,
No. 660. vs.
The International Trust Company, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Colorado.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Colorado, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause, be, and the same is hereby affirmed, with costs; and that The International Trust Company have and recover against The Insurance Company of North America the sum of twenty dollars for its costs herein, and have execution therefor.

December 2, 1895.

And on the thirteenth day of January, A. D. 1896, a petition of Plaintiff in Error for a re-hearing was filed in said cause, in the following words, to-wit:

[Transcript page 178-179.]

UNITED STATES CIRCUIT COURT OF APPEALS

EIGHTH CIRCUIT.

DECEMBER TERM, 1895.

No. 660.

THE INSURANCE COMPANY OF NORTH AMERICA, PLAINTIFF IN ERROR,

vs.

THE INTERNATIONAL TRUST COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

Petition for Re-Hearing.

To the Honorable, the Judges of the United States Circuit Court of Appeals of the Eighth Circuit:

Now comes the plaintiff in error, the Insurance Company of North America, and respectfully petitions this Honorable Court to set aside the judgment heretofore rendered by this

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Court in the above entitled cause and to grant to the said plaintiff in error in said cause a re-hearing thereof for the following reasons:

I.

The majority of the Court erred in holding that the alleged finding of fact by the trial Court to the effect "that the Inter-

national Trust Company did, on the 12th day of June, 1893, reacquire title to the Gordon note and an insurable interest in and to the property; and that the Trust Company did, on the 12th day of June, 1893, actually pay to the Investor's Company the sum of $1,750 as part of the amount due upon repurchase, and did assume the balance of the purchase price and did from that time on treat and dispose of said note as its own property," is conclusive upon this Court and that said finding cannot be reviewed.

II.

The Court erred in believing and assuming that the finding of the Court in this behalf was a finding of fact; whereas it was a finding of law and not a finding of fact.

III.

The Court erred in assuming as stated in the opinion of the Court that it is "conceded that the facts as found fully support the judgment rendered." Whereas it is not so conceded,

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but is contended by the plaintiff in error; the Insurance Company of North America, that the facts as found by the Court do not support the judgment, because said findings show that John R. Gordon had sold and disposed of all of his interest in the property on the third day of July, 1893, and the policy of the Insurance Company of North America was not issued until the 6th day of July, 1893.

IV.

The Court erred in assuming, as stated on p. 2 of the opinion, that it is "conceded that the facts as found fully support the judgment rendered," whereas it is not so conceded, but it is contended on behalf of the Insurance Company of North America that conceding the facts to be supported by the evidence and to have been properly made by the trial Court, they are nevertheless insufficient in law to support the judgment because the contract or so-called mortgage clause does not release or exempt the International Trust Company from the acts of Gordon, the insured under said policy.

V.

The court erred in stating that "The chief contention in these cases is that when the policy in suit was issued, the Trust Company had no insurable interest in the property." Whereas it is the contention of the plaintiff in error not merely that the Trust Company had no insurable interest, but that it did not have the insurable interest required by the con-

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ditions of the contract of insurance.

VI.

The Court erred in assuming that the finding of the trial Court to the effect that the Trust Company did reacquire "an insurable interest" in the property was tantamount to a finding that it re-acquired the insurable interest required by the terms of the insurance contract, or that it had such interest when the policy was issued.

VII.

The Court erred in holding that the Circuit Court did not err in finding that the Trust Company had at the time the policy of the Insurance Company of North America was issued such an insurable interest as was sufficient to support the policy of that company.

VIII.

The Court erred and misapprehended the evidence in holding that the payment on June 12th, 1893, by the Trust Company of the interest on the Gordon note, amounting to $1,750, was a payment upon the purchase price of said note, it being shown by the record that the payment of this amount was a mere advancement on account of John R. Gordon, which advancement was actually paid by John R. Gordon to the Trust Company within one week thereafter, to-wit, on the

[Transcript page 183.]

19th of June, 1893, whereby whatsoever interest, if any, might have been acquired by the Trust Company in the said note by virtue of the advancement of said interest money was divested and terminated.

IX.

The Court erred in not giving the construction to the mortgage clause asked for on behalf of the plaintiff in error, with respect to the resulting rights of the parties named in the policy and mortgage clause.

X.

The Court erred in adhering to the decision of this Court in the case of the Syndicate Insurance Company vs. Bohn., 12 C. C. A. 531, and in holding that the mortgage contract was unaffected by any act or neglect of the mortgagor done or omitted prior to the execution of the mortgage clause.

XI.

The Court erred in affirming the judgment of the trial Court upon the special findings of fact.

XII.

The Court erred in refusing to consider whether or not there was evidence to support the special findings of fact.

[Transcript page 184.]

XIII.

The Court erred in assuming that "The finding on most of the issues is conceded to be correct."

SYLVESTER G. WILLIAMS AND
WELLS, TAYLOR & TAYLOR,
Counsel for Plaintiff in Error.

I, Sylvester G. Williams, counsel for plaintiff in error in the above entitled cause, do hereby certify that the above and foregoing petition for re-hearing thereof is made in good faith and in the honest belief that the said petition should be granted. And I further certify that to the best of my opinion the grounds for said application as therein stated are sufficient in law, and that said petition is not made for the purpose of vexation or delay.

SYLVESTER G. WILLIAMS,
Counsel for Plaintiff in Error.

Denver, Colorado, December 27th, 1895.

[Transcript page 185.]

And on the twentieth day of January, A. D. 1896, in the record of the proceedings of said court is an order in said cause denying the petition of plaintiff in error for a re-hearing, in the following words, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

December Term, 1895.

Monday, January 20, 1896.

The Insurance Company of North America, Plaintiff in Error,
No. 660. vs.
The International Trust Company, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Colorado.

This cause came on this day to be heard in the petition filed by Mr. Sylvester G. Williams, counsel for Plaintiff in Error, for a re-hearing of this cause and on the brief filed in support thereof.

On consideration whereof, it is now here ordered and adjudged by this court that said petition for a re-hearing of this cause be and the same is hereby denied.

January 20, 1896.

[Transcript page 186.]

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing pages numbered from 1 to [185,] inclusive, contain a full, true and complete transcript of the record from the Circuit Court of the United States for the District of Colorado, as printed by stipulation of parties, together with all the proceedings and record entries including the opinion of said Circuit Court of Appeals in a certain cause, wherein the Insurance Company of North America was plaintiff in error, and the International Trust Company, defendant in error, No. 660, December Term, 1895, as full, true and complete as the originals of the same now remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court at the City of St. Louis, Missouri, in the Eighth Circuit, this thirty-first day of January, A. D. 1896.

JOHN D. JORDAN,

[SEAL] Clerk of U. S. Circuit Court of Appeals, Eighth Circuit.